

REPORTS
OF
Cases Argued and Determined
IN THE
COURT of CLAIMS
OF THE
STATE OF ILLINOIS

VOLUME 14

Containing cases in which opinions were filed and orders of dismissal
entered without opinion between July 1, 1944
and June 30, 1945.

SPRINGFIELD, ILLINOIS
1945

[Printed by authority of the *State of Illinois*.]



PREFACE

The opinions of the Court of Claims herein reported are published by authority of the provisions of Section 9 of an Act entitled “An Act to create the Court of Claims and to prescribe its powers and duties,” approved June 25, 1917.

EDWARD J. BARRETT,
Secretary of State and
Ex-officio Secretary
Court of Claims.

JUDGES OF THE COURT OF CLAIMS

WM. WIRT DAMRON, *Chief Justice*,
ROBERT P. ECXERT, JR., *Judge*,
GEORGE M. FISHER, *Judge*.

GEORGE F. BARRETT, *Attorney General*.

EDWARD J. BARRETT, *Secretary of State and*
Ex-officio Secretary of the Court.
BELLE P. WHITE, *Clerk*.

RULES OF THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

Adopted pursuant to An Act to create the Court of Claims and to prescribe its powers and duties. (Approved June 25, 1917. L. 1917, p. 325.)

TERMS OF COURT

RULE 1. (a) The Court of Claims shall hold a regular session of the Court at the Capital of the State on the second Tuesday of January, March, May, September and November of each year, and such special sessions at such places as it deems necessary or proper to expedite the business of the Court.

(b) No cause will be heard at any session unless the pleadings have been settled and the evidence, abstracts, briefs and argument of both parties have all been filed with the Clerk on or before the first day of said session.

COMPLAINT

RULE 2. (a) Causes shall be commenced by a verified complaint, which, together with four copies thereof, shall be filed with the Clerk of the Court. A party filing a claim shall be designated as the claimant and the State of Illinois shall be designated as the respondent. The original complaint and all copies thereof shall be provided with a suitable cover or back having printed or plainly written thereon the title of the Court and cause, together with the name and address of all attorneys representing the claimant. The Clerk will note on the complaint and each copy the date of filing and deliver one of said copies to the Attorney General.

(b) No person who is not a licensed attorney and an attorney of record in said cause will be permitted to appear for or on behalf of any claimant, but a claimant even though not a licensed attorney, may prosecute his own claim in person. All appearances, including substitution of attorneys, shall be in writing and filed in the cause.

RULE 3. Such complaint shall be printed or typewritten and shall be captioned substantially as follows :

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IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

<p>A. B.,</p> <p>vs.</p> <p>STATE OF ILLINOIS,</p>	}	<p>Claimant</p> <p>No.</p> <p>Respondent</p>
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RULE 4. (a) Such complaint shall state concisely the facts upon which the claim is based and shall set forth the address of the claimant, the time, place, amount claimed, the State department or agency in which the cause of action originated and all averments of fact necessary to state a cause of action at law or in equity.

(b) If the claimant bases his complaint upon a contract or other instrument in writing a copy thereof shall be attached thereto for reference.

RULE 5. (a) The claimant shall state whether or not his claim has been presented to any State department or officer thereof, or to any person, corporation or tribunal, and if so presented, he shall state when, to whom, and what action was taken thereon; and, he shall further state whether or not he has received any payment on account of such claim, and, if so, the amount so received.

(b) The claimant shall also state whether or not any third person or corporation has any interest in his claim, and if any such person or corporation has an interest therein the claimant shall state the name and address of the person or corporation having such interest, the nature thereof, and how and when the same was acquired.

RULE 6. (a) A bill of particulars, stating in detail each item and the amount claimed on account thereof, shall be attached to the complaint in all cases.

(b) Where the claim is based upon the Workmen's Compensation Act or the Occupational Diseases Act, the claimant shall set forth in the complaint all payments, both of compensation and salary, which have been received by him or by others on his behalf since the date of said injury; and shall also set forth in separate items the amount incurred, and the amount paid for medical, surgical and hospital attention on account of his injury, and the portion thereof, if any, which was furnished or paid for by the respondent.

RULE 7. No complaint shall be filed by the clerk unless verified under oath by the claimant, or by some other person having personal knowledge of the facts contained therein.

RULE 8. If the claimant be an executor, administrator, guardian or other representative appointed by a judicial tribunal, a

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duly authenticated copy of the record of appointment must be filed with the complaint.

RULE 9. If the claimant die pending the suit his death may be suggested on the record, and his legal representative, on filing a duly authenticated copy of the record of his appointment as executor or administrator, may be admitted to prosecute the suit by special leave of the Court. It is the duty of the claimant's attorney to suggest the death of the claimant when that fact first becomes known to him.

Rule 10. Where any claim has been referred to the Court by the Governor or either House of the General Assembly any party interested therein may file a verified complaint at any time prior to the next regular session of the Court. If no such person files a Complaint, as aforesaid, the Court may determine the cause upon whatever evidence it shall have before it, and if no evidence has been presented in support of such claim, the cause may be stricken from the docket with or without leave to reinstate, in the discretion of the Court.

RULE 11. If it appears on the face of the complaint that the claim is barred by a statute of limitations, the same shall be dismissed.

PLEADINGS

RULE 12. Pleadings and practice at common law as modified by the Civil Practice Act of Illinois shall be followed except as herein otherwise provided.

RULE 13. The original and four copies of all pleadings shall be filed with the Clerk and the original shall be provided with a suitable cover, bearing the title of the Court and cause, together with a proper designation of the pleading printed or plainly written thereon.

RULE 14. A claimant desiring to amend his complaint or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing five copies of an amended complaint, but any such amendment or the right to introduce new parties shall be subject to the objection of the respondent, made before or at final hearing. Any amendments made subsequent to the time the claimant has closed his testimony must be by leave of Court.

RULE 15. The respondent shall answer within sixty days after the filing of the complaint, and the claimant shall reply within thirty days after the filing of said answer, unless the time for pleading be extended; provided, that if the respondent shall fail to so answer, a general traverse or denial of the facts set forth in the complaint shall be considered as filed.

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EVIDENCE

RULE 16. (a) At the next succeeding term of 'court after the cause is at issue, the Court, upon call of the docket, shall fix the time for the parties to present evidence.

(b) After the cause is at issue the parties shall present evidence either by a stipulation of fact duly entered or by a transcript of evidence taken at such place as is mutually agreeable and convenient to the parties concerned. All witnesses before testifying shall be duly sworn on oath by a notary public or other officer authorized to administer oaths. If the parties are unable to agree upon a place of such hearing, application may be made to any Judge of the Court, who shall thereupon fix a place of such hearing.

RULE 17. All evidence shall be taken in writing in the manner in which depositions in chancery are usually taken. All evidence when taken and completed by either party shall be filed with the Clerk on or before the first day of the next succeeding regular session of the Court.

RULE 18. All costs and expenses of taking evidence on behalf of the claimant shall be borne by the claimant, and the costs and expenses of taking evidence on behalf of the respondent shall be borne by the respondent.

RULE 19. If the claimant fails to file the evidence in his behalf as herein required, the Court may, in its discretion, fix a further time within which the same shall be filed and if not filed within such further time the cause may be dismissed. Upon motion of the Attorney General the Court may, in its discretion, extend the time within which evidence on behalf of the respondent shall be filed.

RULE 20. If the claimant has filed his evidence in apt time and has otherwise complied with the rules of the Court, he shall not be prejudiced by the failure of the respondent to file evidence in its behalf in apt time, but a hearing by the Court may be had upon the evidence filed by the claimant unless, for good cause shown, additional time to file evidence be granted to the respondent.

RULE 21. All records and files maintained in the regular course of business by any State department, commission, board or agency of the respondent and all departmental reports made by any officer thereof relating to any matter or cause pending before the Court shall be prima facie evidence of the facts set forth therein ; provided, a copy thereof shall have been first duly mailed or delivered by the Attorney General to the claimant or his attorney of record.

ABSTRACTS AND BRIEFS

RULE 22. The claimant in all cases where the transcript of evidence exceeds fifteen pages in number shall furnish a complete typewritten or printed abstract of the evidence, referring to the

pages of the transcript by numerals on the margin of the abstract. The evidence shall be condemned in narrative form in the abstract so as to present clearly and concisely its substance. The abstract must be sufficient to present fully all material facts contained in the transcript and it will be taken to be accurate and sufficient for a full understanding of such facts, unless the respondent shall file a further abstract, making necessary corrections or additions.

RULE 23. When the transcript of evidence does not exceed fifteen pages in number the claimant may file the original and four copies of such transcript in lieu of typewritten or printed abstracts of the evidence, otherwise the original and four copies of an abstract of the evidence shall be filed with the Clerk. The original shall be provided with a suitable cover, bearing the title of the Court, and cause, together with the name and address of the attorney filing same printed or plainly written thereon.

Rule 24. Each party may file with the Clerk the original and four copies of a typewritten or printed brief setting forth the points of law upon which reliance is had, with reference made to the authorities sustaining their contentions. Accompanying such briefs there may be a statement of the facts and an argument in support of such briefs. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon. Either party may waive the filing of his brief and argument by filing with the Clerk a written notice in duplicate to that effect.

RULE 25. The abstract, brief and argument of the claimant must be filed with the Clerk on or before thirty days after all evidence has been completed and filed with the Clerk, unless the time for filing the same is extended by the Court or one of the Judges thereof. The respondent shall file its brief and argument not later than thirty days after the filing of the brief and argument of the claimant, unless the time for filing the brief of claimant has been extended, in which cases the respondent shall have a similar extension of time within which to file its brief. Upon good cause shown further time to file abstract, brief and argument or a reply brief of either party may be granted by the Court or by any Judge thereof.

RULE 26. If a claimant shall fail to file either abstracts or briefs within the time prescribed by the rules, the Court may enter a rule upon him to show cause by a day certain why his claim should not be dismissed. Upon the claimant's failure to comply with such rule, the cause may be dismissed or the Court may, in its discretion, either extend the time for filing abstracts or briefs, or pass or continue the cause for the term, or determine the same upon the evidence before it.

RULE 27. If the claimant has filed abstracts and briefs, as herein provided, in apt time, and has otherwise complied with the rules, he shall not be prejudiced by the failure of the respondent to file abstracts or briefs on time, unless the time for the filing of abstracts or briefs by the respondent be extended.

EXTENSION OF TIME

RULE 28. Where by these rules it is provided the time may be extended for the filing of pleadings, abstracts or briefs, either party, upon notice to the other, may make application for an extension of time to any Judge of this Court, who may enter an order thereon, transmitting such order to the Clerk, and the Clerk shall thereupon place the same of record as an order of the Court.

MOTIONS

RULE 29. Each party shall file with the Clerk the original and four copies of all motions presented. The original shall be provided with a suitable cover, bearing the title of the Court and cause, together with the name and address of the attorney filing same printed or plainly written thereon.

RULE 30. Motions shall be filed with the Clerk at least five days before they are presented to the Court. All motions will be presented by the Clerk immediately after the daily announcement of the Court but at no other time during the day, unless in case of necessity, or in relation to a cause when called in course. All motions and suggestions in support thereof shall be in writing, and when the motion is based on matter that does not appear of record, it shall be supported by affidavit.

RULE 31. In case a motion to dismiss is denied, the respondent shall plead within thirty days thereafter, and if a motion to dismiss be sustained, the claimant shall have thirty days thereafter within which to file petition for leave to amend his complaint.

ORAL ARGUMENTS

RULE 38. Either party desiring to make oral arguments shall file a notice of his intention to do so with the Clerk at least ten-days before the session of Court at which he wishes to make such argument.

REHEARINGS

RULE 33. A party desiring a rehearing in any cause shall, within thirty days after the filing of the opinion, file with the Clerk the original and four copies of his petition for rehearing. The petition shall state briefly the points supposed to have been overlooked or misapprehended by the Court with proper reference to

the particular portion of the original brief relied upon and with authorities and suggestions concisely stated in support of the points. Any petition violating this rule will be stricken.

RULE 34. When a rehearing is granted the original briefs of the parties and the petition for rehearing, answer and reply thereto shall stand as files in the case on rehearing. The opposite party shall have twenty days from the granting of the rehearing to answer the petition and the petitioner shall have ten days thereafter within which to file his reply. Neither the claimant nor the respondent shall be permitted to file more than one application or petition for a rehearing.

RECORDS AND CALENDAR

RULE 35. The Clerk shall record all orders of the Court, including the final disposition of causes. He shall **keep** a docket in which he shall enter all claims filed, together with their number, date of filing, the name of claimants, their attorneys of record and respective addresses. As papers are received by the Clerk, in course, he shall stamp the filing date thereon and forthwith mail to opposing counsel a copy of all orders entered, pleadings, motions, notices and briefs' as filed; such mailing shall constitute due notice and service thereof. Within ten days prior to the first day of each session of the Court, the Clerk shall prepare a calendar of the causes to be set for trial and of the causes to be disposed of at such session and deliver a copy thereof to each of the Judges and to the Attorney General.

RULE 36. Whenever on peremptory call of the docket any claim or claims appear in which no positive action has been taken and no attempt made in good faith to obtain a decision or hearing of the same, the Court may, on its own motion, enter an order therein ruling the claimant to show cause on or before the first day of the next succeeding regular session why such claim or claims should not be dismissed for want of prosecution and stricken from the docket. Upon the claimant's failure to take some affirmative action to discharge or comply with said rule, prior to the first day of the next regular session after the entry of such order, such claim or claims may be dismissed and stricken from the docket with or without leave to reinstate on good cause shown. On application and a proper showing made by the claimant the Court may, in its discretion, grant an extension of time under such rule to show cause. The fact that any case has been continued or leave given to amend or that any motion or matter has not been ruled upon will not alone be sufficient to defeat the operation of this rule. And the Court may, during the second day of any regular session, call its docket for the purpose of disposing of cases under this rule.

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ORDER OF THE COURT

The above and foregoing rules were adopted as the rules of the Court of Claims of the State of Illinois on the 15th day of September, **A. D. 1943**, to be in full force and effect from and after the first day of January, **A. D. 1944**, in lieu of all rules theretofore in force.

COURT OF CLAIMS LAW

AN ACT to create the Court of Claims and to prescribe its powers and duties. (Approved June 25, 1917. L. 1917, p. 325.)

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* The Court of Claims is hereby created. It shall consist of a chief justice and two judges, appointed by the Governor by and with the advice and consent of the Senate. In any case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office; and any person so nominated, who is confirmed by the Senate, shall hold his office during the remainder of the term and until his successor is appointed and qualified. If the Senate is not in session at the time this Act takes effect, the Governor shall make a temporary appointment as in case of a vacancy.

§ 2. The term of office of the chief justice and of each judge shall be from the time of his appointment until the second Monday in January next succeeding the election of a Governor, and until his successor is appointed and qualified. This provision in reference to the term of office of the chief justice and of each judge shall apply to the current terms of said offices and the respective terms of the present incumbents shall be deemed to have begun upon the appointment of said incumbents. (As amended by Act approved and in force May 11, 1927. L. 1927, p. 393.)

EMERGENCY.] § 3. WHEREAS, in order that the full salary of said chief justice and of said judges as provided for by an Act of the Fifty-fourth General Assembly may be paid out of an appropriation made and now available therefor; therefore an emergency exists and this Act shall take effect and be in force and effect from and after its passage and approval. (Act approved May 11, 1927. L. 1927, p. 393.)

§ 3. Before entering upon the duties of the office the chief justice and each judge shall take and subscribe the constitutional oath of office, which shall be filed in the office of the Secretary of State.

§ 4. The chief justice and each justice shall each receive a salary of three thousand two hundred dollars per annum, payable in equal monthly installments. (As amended by Act approved, July 8, 1933. L. 1933, p. 452.)

§ 5. The Secretary of State shall be *ex-officio* secretary of the Court of Claims. He shall provide the court with a suitable place in the capitol building in which to transact, its business.

§ 6. The Court of Claims shall have power:

(1) To make rules and orders, not inconsistent with law, for carrying out the duties imposed upon it by law;

(2) To make rules governing the practice and procedure before the court, which shall be as simple, expeditious and inexpensive as reasonably may be;

(3) To compel the attendance of witnesses before it, or before any notary public or any commissioner appointed by it, and the production of any books, records, papers or documents that may be material or relevant as evidence in any matter pending before it;

(4) To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated *ex contractu* and *ex delicto*, which the State, as a sovereign commonwealth, should, in equity and good conscience, discharge and pay;

(5) To hear and give its opinion on any controverted questions of claims or demand referred to it by any officer, department, institution, board, arm or agency of the State government and to report its findings and conclusions to the authority by which it was transmitted for its guidance and action;

(6) To hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by any employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the "Workmen's Compensation Act," the Industrial Commission being hereby relieved of any duty relative thereto.

§ 7. In case any person refuses, to comply with any subpoena issued in the name of the chief justice, attested by the Secretary of State, with the seal of the State attached, and served upon the person named therein as a summons at common law is served, the Circuit Court of the proper county, on application of the Secretary of the Court, shall compel obedience by attachment proceedings, as for contempt, as in a case of a disobedience of the requirements of a subpoena from such Court on a refusal to testify therein.

§ 8. The concurrence of two members of the Court shall be necessary to the decision of any case.

§ 9. The Court shall file a brief written statement of the reasons for its determination in each case. In case the Court shall allow a claim, or any part thereof, which it has the power to hear and determine, it shall make and file an award in favor of the claimant finding the amount due from the State of Illinois. Annually the Secretary of the Court shall compile and publish the opinions of the Court.

§ 10. Every claim against the State, cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the Secretary of the Court within five years after the claim first accrues, saving to infants, idiots, lunatics, insane persons and persons under disability at the time the claim accrued two years from the time the disability is removed.

§ 11. The Attorney General shall appear for and represent the interests of the State in all matters before the Court.

§ 12. All claims now pending in the Court of Claims created under "An Act to create the Court of Claims and prescribe its powers and duties," approved May 16, 1903, in force July 1, 1903, shall be heard and determined by the Court of Claims created by this Act in accordance with the provisions hereof.

§ 13. The jurisdiction conferred upon the court of Claims by this Act shall be exclusive. No appropriation shall hereafter be made by the General Assembly to pay any claim or demand, over which the Court of Claims is herein given jurisdiction, unless an award therefor shall have been made by the Court of Claims.

§ 14. Repeal.

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CASES ARGUED AND DETERMINED IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

(No. 2762—Claimant awarded \$125.00.)

PAUL H. BOYERS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944.

CLARENCE B. DAVIS, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may not* be increased. Claimant had been previously compensated by awards on the basis of an aggregate of sixty-five (65) per cent total and permanent disability. Where it appears from the evidence submitted that claimant is now employed and earning more than he earned prior to the accident the Court would not be justified in granting a further award.

Under Section 8a of the Workman's Compensation Act an award may be made for all necessary medical, surgical and hospital services reasonably required to cure or relieve the effects of an injury.

Per Curiam:

On June 30, 1937, an award was made to the claimant, Paul H. Boyers, in the amount of Two Thousand Two Hundred and Twenty-five Dollars (\$2,225.00), compensation for a 50 per cent permanent disability. Jurisdiction was expressly reserved for such further orders as might subsequently be made. (*Boyers vs. State*, 9 C. C. R., 530). On May 14, 1941, an additional award was made to the claimant in the amount of Six Hundred Sixty-seven Dollars and Fifty Cents (\$667.50), compensation for an additional 15 per cent permanent disability. Jurisdiction of the case was again retained.

On April 27, 1942, claimant filed herein his motion to reopen the case for the purpose of taking additional testimony and seeking an additional award on the ground that since the award of May 14, 1941, his health had become worse and his earning power gradually decreased. The motion was granted, and further testimony was taken on August 24, 1942. On March 9, 1943, the Court found that an insufficient showing had been made by claimant and denied a further award. Petition for rehearing was denied April 15, 1943. (*Boyer vs. State*, 12 C. C. R. 377). On May 27, 1943, claimant again moved to reopen the case to present new and additional testimony. This motion was granted, and further testimony was heard by one of the judges of this Court at Sterling, Illinois, on January 31, 1944.

It appears clearly from the record that the claimant's present physical condition is a result of the injury for which the previous awards were made ; that claimant has been compensated on the basis of an aggregate of sixty-five (65) per cent total and permanent disability; that claimant's physical condition grows slowly and progressively worse. ,It is very possible that claimant will ultimately be wholly and permanently incapacitated. Obviously, however, he is not wholly incapacitated at the present time, and although the medical testimony indicates an increase of disability since the last prior award, the testimony also shows that claimant is now employed by the International Harvester Company as a machinist, working forty-eight (48) hours a week. He earns an average of ninety-eight and one-half cents (98½) an hour. Even with time off because of ill health, he is employed ninety (90) per cent of the time. When the injury occurred, claimant was earning between \$30.00 and \$34.00 per week. In view of the fact that he is now

employed and earning more than he earned prior to the accident, the Court would not be justified in granting a further award at this time.

The claimant, however, has incurred, since the prior award in this case, medical expenses which were clearly necessary to relieve him from the effects of the injury sustained. Under Section 8a of the Workmen's Compensation Act, an award may be made for all necessary medical, surgical and hospital services reasonably required to cure or relieve from the effects of an injury. (*Penwell vs. State*, 12 C. C. R. 73.) Claimant is therefore entitled to an award in the amount of One Hundred and Twenty-five Dollars (\$125.00) for necessary medical expenses incurred as a result of the injury and for which he has not previously been reimbursed.

An award is therefore made in favor of the claimant in the amount of One Hundred and Twenty-five Dollars (\$125.00), payable forthwith.

(No. 3055—Claim denied.)

GEORGE B. RICHARDSON, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed September 12, 1944.

WEILEPP & WILSON, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR AND C. ARTHUR NEBEL, Assistant Attorneys General, for respondent..

CONTRACT—when a supplemental agreement relating to specific items of **work** does not vitiate other terms and conditions of original contract. Where a supplemental agreement, which modified the original contract only by striking the items of work which the claimant had not completed, and the same was for the benefit and relief of the claimant, the modification was limited and specific and contained

no waiver of the State's defense of final payment. Claimant's acceptance of final payment thus constituted a full release to the State.

ECKERT, J.

On October 29, 1932, claimant and respondent entered into a contract for the construction of State Bond Issue Route No. 177, Federal Aid Project No. E-223, Section 109-B, Washington County, Illinois, at a cost of \$17,325.50. The improvement included the construction of one reinforced concrete deck girder bridge and the widening of a second bridge. On February 24, 1933, while the claimant was engaged in the performance of his contract, he was notified by the respondent to suspend immediately all operations under the contract. On September 7, 1933, the respondent requested claimant to submit all bills **for** work which **had** been completed, including extras. In accordance with this request, claimant submitted fifteen bills, totalling \$6,234.12. Claimant now seeks an award in that amount for damages allegedly sustained by respondent's failure to allow claimant to complete his contract.

On June 18, 1935, claimant was notified by the Department of Public Works and Buildings, Division of Highways, to proceed with the completion of the contract. Following receipt of this notice, on June 25, 1935, claimant wrote to the Chief Highway Engineer of the Division of Highways stating :

" . . . In view of the fact that the cost of doing business is considerably greater now than when the work was ordered discontinued. I wish to request a release from this contract, and also respectfully request permission to bring suit before the Court of Claims for **any** items of extra bills arising from the stoppage of work, which you may not see fit to allow or are not authorized to allow in this connection."

Under date of July 16, 1935, the Engineer of Construction replied to the above letter as follows:

"This acknowledges your letter of June 25th addressed to Mr. Lieberman. I have discussed this matter with Mr. Lieberman, and we are arranging for a formal annulment of this contract, bearing in mind, of course, the last paragraph of your letter which refers to your request to bring suit before the Court of Claims for certain extras which were incurred on account of shutting down of this job."

Under date of **August 20, 1935**, after submitting to claimant a supplemental agreement, **C. M. Hathaway**, Engineer of Construction, in a letter to claimant stated :

"We understand that the signing of this supplementary agreement does not in any way prejudice your application to file a claim for alleged losses due to the closing down of the contract in the manner as ordered, and we likewise understand that the signing of this supplementary agreement should not in any way prejudice the claim itself."

On **August 26, 1935**, claimant and respondent executed the supplementary agreement, which, in substance, relieved claimant from the completion of the work remaining undone under the terms of the original contract, and which provided in part as follows :

"For and in consideration of the mutual interest of the interested parties, it is hereby mutually agreed that the above mentioned contract be modified by striking from said contract certain portions of the work hereinafter described."

The Standard Specifications for Road and Bridge Construction, adopted by the Department of Public **Works** and Buildings of the State of Illinois on **January 2, 1932**, and forming a part of the original contract, provide in part as follows :

"Whenever the improvement provided for by the contract shall have been completely performed on the part of the Contractor, and all parts of the work have been approved by the Engineer and accepted by the Department, a final estimate showing the value of the work **will** be prepared by the Engineer as soon as the necessary measurements and computations can be made, all prior estimates upon which payments have been made being approximate only and subject to the correction in the final payment. The amount of this estimate, less any sums that have been deducted or retained under the provisions of the contract, will be paid to the Contractor as soon as practicable after

the final acceptance, provided the Contractor has furnished to the Department satisfactory evidence that all sums of money due for any labor, materials, apparatus, fixtures, or machinery furnished for the purpose of such improvement have been paid or that the person or persons to whom the same may respectively be due have consented to such final payment.

"The acceptance by the Contractor of the last payment as aforesaid shall operate as and shall be a release to the Department **from** all claims or liability under this contract for anything done or furnished or relating to the work under this contract, or for any act or neglect of said Department-relating to or connected with this contract."

A final estimate was prepared by the Department of Public Works and Buildings pursuant to this provision; such final payment estimate for \$681.54 was scheduled for payment to claimant; on September 23, 1935, the Auditor issued State Warrant No. 154620, in the amount of \$681.54 payable to claimant; this warrant was sent to claimant, was received, accepted, and deposited for payment by claimant, and was paid by the Auditor of Public Accounts as of September 29, **1935**.

It is the claimant's contention that such payment is not a defense to this claim; that the release provisions of the original contract are not applicable because of the execution of the supplemental contract, and because of the correspondence between the claimant and respondent which preceded its execution. There is nothing in the correspondence, however, to indicate an agreement upon the part of the respondent to waive any provision of the original contract. The correspondence merely stated that the signing of the supplemental agreement would not in any way prejudice the claim. It has not done so, and therefore it is not necessary to consider the question of the authority of C. M. Hathaway, Engineer of Construction, or of Ernest Lieberman, Chief Highway Engineer, to make such an agreement. It is to be noted, however, that neither Hathaway nor Lieberman was the

Director of the Department of Public Works and Buildings, and that neither can exercise the power of the Director of the Department to contract on behalf of the State of Illinois. (*L.B. Strandberg & Son Co. vs. State*, opinion filed September 14, 1943.)

The supplementary agreement also fails to sustain claimant's contention. That agreement modified the original contract only by striking the items of work which claimant had not completed. Otherwise the original contract remained in full force and effect. It contains no waiver of the respondent's defense of final payment. The execution of the supplemental contract was for the benefit and relief of the claimant, and was a modification, limited and specific,

Claimant relies upon the case of *Moore Brothers Construction Company vs. State*, 10 C. C. R. 625, a suit arising out of the same construction in which claimant was engaged. There, however, no question of final payment was raised or considered by the court in the determination of the case.

From the record here it appears that final payment was tendered and accepted by claimant. The specifications forming a part of the contract provided that acceptance of final payment should be a release of all claims and liability. Claimant's acceptance of final payment thus constituted a full release to the respondent. (*Henkel Construction Co. vs. State*, 10 C. C. R. 538; *L. B. Strandberg & Son Co. vs. State*, supra.)

Claim dismissed.

(No. 3204—Claimant awarded **\$760.00.**)

CATHERINE VOITIK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944.

Rehearing denied November 14, 1944.

RAY F. FAULKNER, for claimant.

GEORGE F. BARRETT, Attorney General; **GLENN A. TREVOR** AND **ROBERT V. OSTROM**, Assistant Attorneys General, for respondent.

DAMAGE TO PROPERTY—*when taken for public use—award may be made for.* Under Article 2, Section 3 of the Constitution of Illinois, private property shall not be taken or damaged for public use without just compensation. Any change in the grade of a street, by which ingress and egress from private property of an owner is obstructed amounts to damaging property for public use within the meaning of the constitution, and has been held so in a great number of cases.

FISHER, J.

We considered this claim at the September, 1943, term of this Court. We found at that time that the proof of claimant's ownership of the land in question was insufficient, and claimant was granted additional time to make proper proof.

The claim was filed February 14, 1938, and the record completed July 26, 1944. The claim is for damages to real estate, alleged to be owned by claimant, caused by the construction of the East approach to the McDonough Street bridge across the DesPlaines River and the Illinois Michigan Canal at McDonough Street, Joliet, Illinois. Claimant seeks damages in the sum of \$3,000.00.

The record now consists of the complaint, transcript of testimony, supplemental proofs by claimant filed November 3, 1943, statement, brief and argument on behalf of respondent, motion of respondent for leave to present further evidence, and waiver by respondent of the right to present further evidence.

The complaint alleges that the damages were sustained as a result of a change in the street grade, raising the grade about seven feet at one point of the property and sloping eastward to about the old grade at the easterly point of the property. The material allegations of the complaint are sustained by the evidence.

Article 2, Section **13** of the Constitution of Illinois provides : "Private property shall not be taken or damaged for public use without just compensation."

Any change in the grade of a street, by which ingress and egress from the private property of an owner is obstructed amounts to damaging property for public use within the meaning of Article 2, Section **13** of the Constitution of Illinois. This has been held in a great number of cases, among the most recent of which is *People vs. Kelly*, **361 Illinois 54**.

In order to determine the fair and reasonable amount of damages sustained by claimant, this Court found it desirable to view the 'property involved and make an investigation of' the value thereof, and from such view and investigation, and from all the evidence before us, we are of the opinion that claimant has sustained damages in the sum of Seven Hundred Fifty Dollars (\$750.00) and is entitled to an award for such sum.

■ An award is entered in favor of claimant, Catherine ,Voitik, in the sum, of Seven Hundred Fifty Dollars (\$750.00).

(No. 3539—Claimant awarded \$3,672.00.)

CECILE N. MULLINAX, ET AL., Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed March 15, 1944.

Dissenting opinion filed by Chief Justice Damron.

Modified opinion filed September 12, 1944.

R. E. BOLEY AND SHAPIRO & LAURIDSEN, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L.
MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made for death of employee under.* Where it appears that an attendant at Manteno State Hospital, while engaged in the performance of his duties, contracts typhoid fever during the course of an epidemic of typhoid fever existing there at the time and died as a result thereof, said accident arose out of and in the course of his employment and his widow is entitled to compensation therefor in accordance with the provisions of Section 7 (a) of the Workmen's Compensation Act upon compliance with the terms thereof.

FISHER, J.

Claimant, Cecile N. Mullinax, is the widow of Rollie E. Mullinax, deceased, who was formerly employed by the Department of Public Welfare of the State of Illinois as an attendant at the Manteno State Hospital. During the month of August, 1939, in the course of his employment, the deceased was required to attend patients who had contracted typhoid fever. On or about August 10, 1939, the deceased became ill with typhoid fever and died on September 10, 1939, as a result of such illness. The earnings of the deceased during the year preceding his death were Nine Hundred Eighteen Dollars (\$918.00).. He left no children under sixteen (16) years of age at the time of his death. Claimant seeks an award in the sum of Ten Thousand Dollars (\$10,000.00).

The record consists of the Complaint, Amended Complaint, Stipulation, Waiver of Statement, Brief and Argument by both Claimant and the Attorney General, Hospital Records and the Testimony of Cecile N. Mullinax and Daniel K. Hur, treating physician.

At the time of his illness, the deceased and Respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the illness and claim for compensation were made within the time provided by the law.

There is some divergence between the allegations of the complaint and the evidence herein, and many allegations of the complaint are not sustained by the evidence. However, the material and pertinent allegations—that the deceased was an employee of the respondent at the Manteno State Hospital as an attendant; that an epidemic of typhoid fever existed at the said hospital; that during the time of said epidemic and during the time of his employment the deceased contracted typhoid fever and died as a result thereof; are all fully sustained by the evidence.

It is stipulated, among other things, by claimant and respondent, that a typhoid fever epidemic existed at the Manteno State Hospital from July 10, 1939, to December 10, 1939.

The facts herein are similar to the case of *Mary Ade, Claimant*, vs. *State*, No. 3429, determined at the September, 1943, term of this Court, in which case we discussed the law at length, which controls in this case. We concluded that under such facts, a claimant is entitled to the benefits of the Workmen's Compensation Act.

We conclude from the facts herein that Rollie E. Mullinax, during the course of and out of his employment at the Manteno State Hospital, contracted typhoid fever

and died as a result thereof, and that his widow, Cecile N. Mullinax, is entitled to compensation therefor in accordance with the provisions of Section 7 (a) of the Workmen's Compensation Act.

An award is therefore entered in favor of Cecile N. Mullinax, in the sum of Three Thousand Six Hundred Seventy-two Dollars (\$3,672.00), payable Two Thousand Seventy Dollars and Ninety Cents (\$2,070.90) which is accrued and payable forthwith, and the balance of One Thousand Six Hundred One Dollars and Ten Cents (\$1,601.10) payable in weekly installments of Eight Dollars and Eighty-five Cents (\$8.85) each beginning March 17, 1944.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

DISSENTING OPINION BY CHIEF JUSTICE DAMRON.

I cannot agree with the majority opinion allowing an award for the death of Rollie E. Mullinax.

The claimant in this case avers that Rollie E. Mullinax died as a result of drinking polluted water which contained typhoid bacteria, furnished by the Manteno State Institution to him while an employee of the State at said institution, and that his death thereby was caused by the carelessness of the Director of the Department of Welfare and the superintendent of the institution. That both the director and the superintendent had been advised and informed that the drinking water, furnished the inmates and the employees of the institution contained typhoid bacteria and contained dangerous elements prior to the beginning of the illness of the deceased. That their failure to take such steps or precautions to

guard the health and safety of the employees and inmates of the institution was negligence, carelessness and dereliction of duty.

There is no evidence whatever supporting these allegations. No reference is made to the water being polluted in the evidence.

The question of whether or not the water at the institution was contaminated by typhoid bacilli has been litigated considerably in the case of the *People of the State of Illinois vs. Bowen*, 376 Ill. 317. There was no proof that typhoid bacilli was found in the drinking water of the Manteno State Hospital. There was no report of the Department of Health within seven or eight months of the outbreak of this epidemic showing that the water was polluted. There was a total failure to prove in the Bowen case that the water was polluted with typhoid bacilli; also there was a total failure to prove that there existed any defect or leak in the sewage system of the institution.

The evidence in this case shows that this claimant worked at said institution but resided in the Village of Manteno. The typhoid epidemic was not wholly confined to the Manteno State Hospital but had spread to other towns and villages in that section of the State, and this Court cannot assume that he was injured by reason of drinking polluted water furnished by the respondent when the record is devoid of such proof.

I agree with what was said in *Schwartz, et al., vs. Ind. Com.*, 379 Ill. 139:

“It is not sufficient that an accidental injury was received by an employee in the course of his employment, but it must arise while he is acting within the duties of his employment or doing some act incidental thereto, and both elements must be present at the time of the injury in order to justify compensation, the burden of proof being on

the claimant to establish both elements by clear and convincing evidence."

In the case of *Anna A. Esker, Adrx., et al* vs. *State*, 12 C. C. R. 344, which this Court had under consideration in the January Term, 1943, the claimant, Anna A. Esker, alleged that Lawrence Esker, deceased, contracted typhoid fever on the 16th day of October, 1940, in connection with his duties, by drinking water which was contaminated. The evidence showed that the crew with whom Esker worked had been away from home during the week and returned home on weekends; that during the week they would stay at hotels or rooming houses in cities near their work; that they would have their meals in restaurants; that they would take water out with them when they went out on the job; also that most of their water was obtained from wells, cisterns or some farms or residences near their work. The evidence did not show that any tests were made of any of the sources of the water supply to determine if any of them were contaminated with typhoid germs. An award was denied in this case and we said:

"The applicant has the burden of proof upon every essential element of a right to compensation, and the proof required is that he established every disputed question of fact as to such right, by a preponderance or greater weight of the competent evidence, and no award can be based upon speculation, surmise, conjecture or upon a choice between two views equally compatible with the evidence."

And we cited *Bauer & Black vs. Ind. Corn.*, 322 Ill. 165; *Madison Coal Companies vs. Ind. Corn.*, 320 Ill. 298.

We further said:

"It is a generally accepted view that typhoid fever is contracted by food or liquids taken through the mouth. The deceased may have contracted his disease by the food, milk or water which he consumed at home * * *. For this Court to conclude that the typhoid fever

contracted by the deceased was a result of drinking water obtained from sources of supply through the project on which he was working, would be to indulge in speculation, surmise and conjecture, and would not be based upon competent evidence before it."

In the case now before the court, the deceased worked at the Manteno State Hospital in the daytime, had one meal a day at the institution and lived at his home in the Village of Manteno. There seems to be no question that he died with typhoid fever, but it is just as reasonable to suppose that he contracted this disease at his home as it would be to conclude that he contracted it at the institution of the respondent.

An award of compensation, to be sustained, must be founded upon facts and inferences reasonably drawn from facts proved by the evidence and cannot be based upon guess or conjecture. Likewise, the burden is on the claimant for compensation to prove that the death of the employee was the result of an *accident arising out of and in the course of his employment*. This she has failed to do. *Fittro vs. Ind. Corn.*, 377 Ill. 532.

The evidence in this case does not support an award.

(Award Modified.)

WORKMEN'S COMPENSATION ACT—*when remarriage of widow of employer extinguishes right to further compensation.* Under the provisions of Section 7, par. (a) of the Workmen's Compensation Act, upon the remarriage of a widow of a deceased employee, her right to receive compensation awarded for his death is extinguished. The decedent having left no children under the ages of sixteen years at the time of his death.

SAME—*Attorney's lien for services — awards not subject to.* Under Section 21 of the Workmen's Compensation Act no payment, claim, award or decision made under the Act shall be subject to any lien.

FISHER, J.

In an Opinion heretofore filed in this cause at the March, 1944, term of this Court, claimant was allowed

an award of Three Thousand Six Hundred Seventy-two Dollars (\$3,672.00).

The matter now comes before the Court on motion of claimant, by R. E. Boley, her attorney, together with affidavit signed by claimant stating that claimant, Cecile N. Mullinax, was married on May 19, 1943, to William McComb and requesting that payments be made to Cecile N. McComb, claimant's present name.

The Court is further advised that the warrants which were issued in this case, amounting to Two Thousand One Hundred Six Dollars and Thirty Cents (\$2,106.30), have never been delivered to claimant and are in possession of the State Auditor of Public Accounts.

Under Section 7, par. (a) of the Workmen's Compensation Act, claimant's right to compensation ceases on the day of her marriage, to-wit: May 19, 1943, the decedent having left no children under the age of 16 years at the time of his death.

Notice of lien for attorney fees was filed by R. E. Boley, First National Bank Building, Olney, Illinois, who represented claimant in this case.

Section 21 of the Workmen's Compensation Act states that * * * "No payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment, or be held liable in any way for any lien, debt, penalty or damages" * * * and, as stated in *Woodruff vs. Mutual Life Insurance Company of New York*, 223 Ill. App. 462, on page 464, "The words 'any lien' in Section 21 referred to obviously include the liens provided for by the act creating attorney's liens." Accordingly, the said claim for lien for attorney's fees must be denied.

Claimant would, therefore, be entitled to an award of One Thousand Six Hundred Ninety-nine Dollars and

Twenty Cents (\$1,699.20) instead of Three Thousand Six Hundred Seventy-two Dollars (\$3,672.00), being compensation for the period from September 10, 1939, to May 19, 1943, 192 weeks at \$8.85 per week. The award heretofore made to the claimant at the March, 1944, term of this Court in the sum of \$3,672.00 is hereby reduced to the sum of \$1,699.20, all of which sum having accrued, is payable forthwith.

It is ordered that the said sum of \$1,699.20 be, and is, hereby payable to Cecile N. McComb.

It is further ordered that the lien filed for attorney's fees by R. E. Boley be, and is, hereby denied.

It is further ordered that the State Auditor of Public Accounts cancel and extinguish warrants which have heretofore been issued in this cause to Cecile N. Mullinax in the sum of \$2,106.30, and that the State Auditor of Public Accounts issue in lieu thereof warrants in the sum of \$1,699.20 to Cecile N. McComb.

(No. 3637—Prior Award Modified.)

MARILYN SUE NEWMAN, MINOR DAUGHTER OF RALPH NEWMAN, DECEASED, BY AND THROUGH HER NEXT FRIEND, NATURAL GUARDIAN AND MOTHER, MARY CATHERINE CAULK, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944.

M. J. HANAGAN, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when remarriage of widow of deceased employee extinguishes her right to further compensation.* Under the provisions of Section 7, par. (a) of the Workmen's Compensation Act, a widow, upon her remarriage is not entitled to any future benefits and all payments due under previous award, subsequent to the date

of her remarriage are due and payable to the minor daughter of the deceased workman.

FISHER, J.

In an Opinion heretofore filed in this cause at the January, 1942, term of this Court, entitled *Mary Catherine Newman, Claimant, vs. State of Illinois*, Respondent, No. 3637, an award was made of \$4,832.90.

The matter now comes before the Court for a modification of our previous award, on the grounds that Mary Catherine Newman, widow of Ralph Newman, deceased, married Wade L. Caulk on May 1, 1943. Under the provisions of Section 7, par. (a) of the Workmen's Compensation Act, she is not entitled to any future benefits, and all payments due under our previous award subsequent to May 1, 1943, are due and payable to Marilyn Sue Newman, the minor daughter of Ralph Newman, deceased. Payments were made to claimant up to April 12, 1943, when they were discontinued, and amounted to the sum of \$1,356.90, leaving the unpaid balance of the award \$3,476.00.

The award heretofore entered in this cause is hereby modified to the effect that the unpaid balance of \$3,476.00 is payable as follows:

(1) The sum of \$44.79 is payable to Mary Catherine Caulk, as compensation from April 12, 1943, to May 1, 1943, a period of 2-5/7 weeks;

(2) The balance of said award, to-wit: \$3,431.21 is payable to Marilyn Sue Newman, the minor daughter of Ralph Newman, deceased, by and through her next friend, natural guardian and mother, Mary Catherine Caulk; and the said sum of \$3,431.21 is payable as follows:

(a) The sum of \$1,171.50, compensation for a period of 71 weeks for the period May 1, 1943, to Sep-

tember 11, 1944, is payable forthwith;

(b) The balance of \$2,259.71 is payable in 136 weekly installments of \$16.50, commencing September 18, 1944, and one final payment of \$15.71.

(No. 3617—Claim denied.)

EDWARD COUGHLIN, SR., Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion. filed September 12, 1944.

Rehearing denied November 14, 1944.

WILLIAM J. APLINGTON, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN A. TREVOR AND ROBERT V. OSTROM, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim by father of deceased, a former air compressor operator employed by the Department of Public Works and Buildings — when accident does not arise out of and in the course of the employment.* When it appears that an employee while driving a truck was on a mission of his own, and that subsequently he was on his way to an unknown destination, and had reached a point which he might have reached by taking an indirect route to reach his employment, had he gone to his employment rather than upon a mission of his own, is insufficient to justify a holding that the fatal accident happened out of the transaction of the business in which the workman was engaged.

ECKERT, J.

Claimant, Edward Coughlin, Sr., is the father of Edward Coughlin, Jr., deceased, a former air compressor operator employed by the Department of Public Works and Buildings of the State of Illinois. About nine-thirty o'clock on the morning of December 31, 1940, while the deceased was driving a truck of the respondent, the truck was struck by a train on the tracks of the Chicago and Alton Railroad Company. Edward Coughlin, Jr., was instantly killed.

The deceased was first employed by the Department for continuous service as a skilled laborer on March 6, 1935. On July 19, 1937, he was assigned to duty as an air compressor operator, his duties including the driving of the motor-driven truck containing an air compressor. His wages during the year next preceding his death were \$1,276.80.

Coughlin was unmarried, and left surviving him his father, Edward Coughlin, Sr., the claimant, sixty-five years of age at the time of the accident, three surviving sisters and four nieces and nephews, children of a deceased sister. Two of his sisters were married and living away from home. His four nieces and nephews made their home with the deceased, and with his father and unmarried sister, but the four nieces and nephews were supported by one of them who worked and by their father who did not live in the same house. The claimant was not employed, owned no property whatsoever, and was supported by his single daughter, Charlotte and the deceased, in the proportions 12/22 by the deceased, and 10/22 by the daughter. During the year preceding the death of the deceased, Charlotte earned \$1,051.54. Claimant seeks an award under the provisions of the Workmen's Compensation Act.

At the time of the accident, the employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The respondent contends, however, that the accident did not arise out of and in the course of the employment.

At the time of the accident, Coughlin, with the consent of his superior, was staying at the Stewart House Hotel, located at Van Buren and Water Streets, in the

City of Wilmington, Illinois. He was instructed by his superior to use the respondent's truck only while doing respondent's work, and to take the shortest available route to and from his work. He was also required to report for work at seven thirty o'clock in the morning. The hotel is two blocks north of Alternate U. S. Route No. 66. - Claimant's work was at the intersection of Regular U. S. Route No. 66 and U. S. Route No. 6. The intersection of these two highways was a mile and a half west of and ten miles north of the hotel.

On the morning of the accident, Coughlin left the hotel, proceeded two blocks southeasterly on Water street, then northeasterly on Alternate U. S. No. 66 through the City of Wilmington, and then directly north on Alternate U. S. No. 66 until he turned east at a point a few miles north of the intersection of Kankakee River Drive and Alternate U. S. No. 66, to stop at the Elwood Ordnance Plant. At the Ordnance Plant he talked to two foremen about securing a job. He then drove back to Alternate U. S. No. 66, drove south until he reached the Kankakee River Drive, which extends in a westerly and northwesterly direction between Alternate U. S. No. 66, and Regular U. S. No. 66, and then drove west on Kankakee River Drive. For a distance of about four thousand feet extending immediately west of U. S. Alternate No. 66, Kankakee River Drive was then a gravel road in fair condition. Beginning at a point four thousand feet west of Alternate U. S. No. 66, extending from such point to Regular U. S. No. 66, Kankakee River Drive had an improved surface. The Chicago and Alton Railroad crosses Kankakee River Drive at a point two thousand six hundred feet west of Alternate U. S. No. 66. Coughlin, driving West on Kankakee River Drive, was killed at this intersection.

The claimant contends that the deceased at the time of the accident was at a place where he reasonably had a right to be in the course of his employment, that he was then and there on duty, and that therefore his death is compensable. He contends that when Coughlin left the intersection of Alternate U. S. No. 66, and Kankakee River Drive, and went North to the Elwood Ordnance Plant, he was temporarily on an errand of his own and outside of the course of his employment; that after he returned from the Ordnance Plant, again reached the intersection, and started west along Kankakee River Road, he was back in the course of his employment; that from the moment that he turned west on Kankakee River Drive, he was in such a reasonable and proper place as he would have been had he left the hotel for his place of duty and not gone to the Ordnance Plant.

A person leaving the Stewart Hotel to go to the intersection of Regular U. S. No. 66 and U. S. No. 6, where the deceased was employed, has a choice of three routes. (1) He might go southwesterly from Wilmington on Alternate U. S. No. 66 to Regular U. S. No. 66, and then straight north on Regular U. S. No. 66 to the intersection. This route would be the longest, but also the only route entirely of concrete. (2) Or he might go northeast by Alternate U. S. No. 66 to its intersection with the Kankakee River Drive, then west and north along Kankakee River Drive, thus passing the scene of the accident. (3) Or he might go north from the Stewart Hotel by what is known as the "stub" road along State Aid Route No. 44 to the Kankakee River Road, and then on to Regular U. S. No. 66. This is the shortest route and is approximately one and one-fourth miles less than by way of Alternate 66 and Kankakee River Drive. From an inspection of the maps offered in evidence, this third route is obviously

the direct route from the hotel to Coughlin's place of employment.

The respondent contends that the deceased was not killed in the course of his employment because he was using the respondent's truck for an unauthorized purpose, and was not performing any duties of his employment when the accident occurred; that even if Coughlin had intended to report at the junction of U. S. 6 and 66 to perform his work, he had chosen a circuitous way for his own benefit, and incurred risks which did not arise out of and in the course of his employment; that not having returned to the regular course of his employment at the time he was killed, his death did not arise out of his employment. Respondent contends that had the claimant not met with the fatal accident, he could have continued in a westerly direction until he reached State Aid Route No. 44, at which time he could have gone south, and returned to the City of Wilmington, or he could have followed the River Road to the junction of Routes 6 and 66, or he could have proceeded to his home in LaSalle.

It is clear from the testimony and the exhibits, that the shortest route available to the deceased from his hotel to his work was over the "stub," State Aid Route No. 44, and the Kankakee River Road, which deceased would have reached in a short time if he had not been struck by the train. Since the deceased was using the respondent's truck in an unauthorized manner, since he had not reported for work at the required hour, the fatal accident occurring some two hours thereafter, and since he had not yet reached any part of what is clearly the direct route to his employment, it is speculative at best to assume that he was on his way to work when the accident occurred. He had unquestionably been on a mission of his own from which he had not returned when he was

killed. Claimant's contention that State Aid Route No. 44 was not a fully paved way and went partly through a congested portion of Wilmington, that others often used Alternate U. S. Route No. 66 to reach the point where the deceased turned west to the River Road, does not change the fact that the obviously direct route to Coughlin's place of employment was by State Aid Route No. 44.

The controlling factor in determining whether an accidental injury arose out of and in the course of the employment is whether the employee was in the orbit, area, or sphere of duty.. It is a question of fact. (*Schafer vs. Industrial Commission*, 343 Ill. 573.) Where an employee goes upon a personal mission, and while on such mission an accident occurs, the accident clearly does not arise out of and in the course of the employment. Although the personal mission may have been accomplished, unless the employee is once more engaged in the duties of his employment when the injury occurs, it is still not compensable. The Workmen's Compensation Act should receive a liberal construction, so that its beneficent intent and purpose may be reasonably accomplished, but its benefits cannot be extended to cover injuries which do not occur in the course of and arise out of the employment. The words "arise out of" have reference to the cause or origin of the accident; the accident must happen out of the transaction of the business in which the workman is engaged. (*United Disposal Company vs. Industrial Commission*, 291 Ill. 480.) When Coughlin chose to go on a mission of his own, he was clearly transacting his own business. The fact that the mission had been completed, that he was on his way to an unknown destination, and had reached a point which he *might* have reached by taking an indirect route to reach his employment, had he gone to his employment rather than upon a mission of

his own, is insufficient to justify a holding that the fatal accident happened out of the transaction of the respondent's employment.

The court is of the opinion that the accident did not arise out of and in the course of the employment of Edward Coughlin, Jr.

An award is therefore denied.

(No. 3665—Claimant awarded \$459.68.)

LEO J. HAHN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944.

LISLE W. MENZIMER, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—claim by employee—a maintenance patrolman—when award may be made for compensation. Where it appears employee sustained an injury to his back as a result of stepping into a concealed hole in the ground, in the course of his employment, he is entitled to an award of 50% of the difference between the average amount he earned before the accident and the average amount he earned after the accident, as provided in Section 8, par. (d) and (h) of the Act.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

This complaint was filed on November 28, 1941, for benefits under the Workmen's Compensation Act; claimant seeks an award for total disability.

The record discloses that this claimant was first employed by the respondent in the Division of Highways in February, 1933, as a maintenance patrolman. On July 2, 1940, claimant was injured while engaged in cutting grass and weeds with a mower on U. S. Route 20, about one mile east of Pecatonica Corners, Winnebago County.

The injury occurred when claimant stepped into a concealed hole, causing an injury to his back.

Claimant continued work until the 15th day of July, 1940, at which time he placed himself under the care of a physician. Later the respondent had him transferred to Chicago, there to be under the care and observation of Dr. H. B. Thomas, orthopedic surgeon.

From the 15th day of July, 1940, to the 25th day of November, 1940, claimant was under the care of Dr. Thomas. He recommended that claimant return to light work. On the last mentioned date, claimant returned to his work on orders of this doctor and continued in his employment until the 7th day of December, at which time he ceased his employment and again was under the care of physicians until the 10th day of February, 1941. On that date he found other employment, selling feed to dealers, which he continued to follow until June 10, 1941. While employed as a salesman, as aforesaid, he testified he was only able to work part time, and that as a result of his condition he earned approximately \$50.00 per month. On June 10, 1941, he found he was able to devote full time to his employment and has been employed regularly since then.'

The report of the Division of Highways filed herein shows that all medical, surgical and hospital bills were paid by the respondent and that claimant was paid compensation by the Division of Highways for temporary total disability for periods from July 16 to November 24, inclusive, and from December 8 to December 11, 1940, inclusive, a total of 19 weeks, amounting to the sum of \$447.70.

From a consideration of the record herein, the Court finds :

That the claimant and the respondent were, on the 2nd day of July, 1940, operating under the provisions of the Workmen's Compensation Act; that on the date last above mentioned said claimant sustained accidental injuries which arose out of and in the course of the employment; that notice of said accident was given said respondent and claim for compensation on account thereof was made on said respondent within the time required under the provisions of said Act;

That the earnings of the claimant, during the year next preceding the injury, were \$1,620.00, and that the average weekly wage was **\$31.15**;

That claimant, at the time of the injury, was 41 years of age, and had three children under sixteen years of age;

That necessary first aid, medical, surgical and hospital services had been provided by the respondent herein;

That as a result of said accidental injury, and commencing on the 15th day of July, 1940, until the 25th day of November, 1940, and from the 7th day of December to the 10th day of February, the claimant was totally incapacitated for work and is entitled to have and receive an award for twenty-eight weeks, at \$19.80 per week, totalling **\$554.40**;

That from February 10 to June 10, 1941, claimant was employed and earned approximately \$50.00 per month. This amounts to the sum of \$19.61 less per week than he was able to earn before the accident. Under Section 8, paragraphs (d) and (h) of the Act, claimant is entitled to 50% of the difference between the average amount he earned before the accident and the average amount he earned after the accident: His earnings lessened to that extent for a period of 18 weeks, amounting

to the total sum of \$352.98. This makes a total award due this claimant of \$907.38. Of that amount the sum of \$447.70 has been paid to claimant by the respondent for unproductive work, which must be deducted.

An award is hereby entered in **favor** of claimant, Leo J. Hahn, in the sum of \$459.68, all of which has accrued and is now payable in a lump sum.

(No. 3721—Claim denied.)

WILLIAM F. LYNCH, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion pled September 12, 1944.

CHARLES V. FALKENBERG, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

CIVIL SERVICE EMPLOYEE—*claim for salary during period of suspension, as junior dentist—when the same must be denied.* The employee was suspended October 6, 1941 and reinstated on January 2, 1942. Hearings on the charges were continued from time to time at the request of the employee. To grant a discharged employee, during such period, a salary would be against public policy and would encourage every discharged employee no matter for what cause he might have been discharged, to file a complaint—and then cause delay and postpone final action by the Commission as long as possible, knowing that the longer the matter could be delayed, the more money he would receive for which no service was rendered.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

This claimant is a doctor of dental surgery, and as such was employed by the respondent under Civil Service Regulations as a junior dentist at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois, which is operated under the Department of Public Welfare of this State.

Having been suspended by the managing officer of said institution on the 6th day of October, 1941, he seeks an award for time lost due to said suspension from that date until his reinstatement on January 2, 1942.

This record consists of the complaint, statement, brief and argument of claimant, report of the Department of Public Welfare, and statement, brief and argument of respondent.

It appears from the record that on and prior to the 6th day of October, 1941, he was employed by the Department of Public Welfare as Attending Junior Dentist and assigned to the above named institution. That he had so been employed since the 10th day of January, 1938. That on the 6th day of October he received a notice of suspension from the managing officer of said institution and following this, formal charges of inefficiency, etc., were preferred against him by Rodney H. Brandon, Director of the Department of Public Welfare, Dr. William C. Daniels and William E. Hogan, before the Illinois Civil Service Commission. As a result of said suspension order, the claimant was idle from October 6, 1941, until January 2, 1942, and seeks an award for his salary and maintenance for October, November and December, 1941, totalling the sum of \$600.37.

From an examination of this record, we find that following the formal charges preferred against this claimant before the Civil Service Commission, that a hearing on these charges was set for the 1st day of November, 1941, but was continued at the request of Dr. Lynch to the 22nd day of November, 1941, and was again continued on that date at his request until the 6th day of December, 1941. On that day a full and complete hearing was had before said Commission and on the 10th day

of December, 1941, the following order was issued by the Civil Service Commission :

"And the said Commission having regularly met and considered the finding of the said board, same is hereby approved, ratified and confirmed.

"And by reason whereof it is the decision of the Illinois State Civil Service Commission that the said Dr. William F. Lynch be returned to the certified position of Junior Dentist effective January 2, 1942, suspension being approved to that date. Further, that Dr. Lynch be assigned to another State Institution by the Director of Public Welfare."

The receipt of this order by the Department of Public Welfare, and in compliance with said order, the Department directed the claimant to report to the Dixon State Hospital on January 2, 1942, as attending Junior Dentist, which was the date set by the Civil Service Commission for his reinstatement. It is not clear from the record whether Dr. Lynch accepted this employment, but it does show that he requested a leave of absence almost immediately after his reassignment to Dixon State Hospital.

The claimant takes the position that the order of suspension by the Civil Service Commission was not justified or sustained by the evidence. Further, that the order was erroneous and void, was contrary to public policy and should be disregarded by this court in passing upon the merits of this claim.

The respondent files a motion to dismiss on the ground that claimant was suspended according to law and is not entitled to any salary or maintenance from the date of his discharge or suspension to the date of his reinstatement on January 2, 1942.

But one question appears to be involved in the within claim. That question is, shall the claimant, who was a qualified and acting Junior Dentist at Normal, Illinois,

be paid by the respondent for the period of his suspension, namely, from October 6, 1941, to January 2, 1942

Both the claimant and respondent in their brief make many references to the charges which were filed against this claimant, and make references to the hearing of claimant before the Civil Service Commission. The formal charges and the evidence taken by the Commission have not been filed in this court. Therefore, we are unable to determine whether the charges were proven by competent evidence and it would not be the province of this court to determine that question. Appeals from the Civil Service Commission rulings do not lie to the Court of Claims. However, both the claimant and the respondent agree on the Commission order and it becomes a part of this record. From it we find that the order of suspension of claimant by the managing officer on October 6, 1941, was sustained to January 2, 1942, and on that date he was to be reinstated and re-employed by the respondent at another institution.

The record further discloses that the claimant was assigned to the Dixon State Hospital by the respondent, in compliance with the Commission order, at his Civil Service rating as a Junior Dentist and ordered to report for work as of January 2, 1942. It is not clear from the record whether the claimant accepted this employment but it does show that he requested a leave of absence almost immediately after his reinstatement and assignment to the Dixon State Hospital. The record further discloses that on October 9, 1941, Dr. Everett Upton was assigned as Junior Dentist to the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois, to replace the vacancy caused by the suspension of the claimant, who **took** up his duties on that day.

The burden is on the claimant to prove by a preponderance of the evidence that he is entitled to an award as alleged in his complaint. This he has failed to do. The record discloses that his suspension by the Civil Service Commission was according to law and binding on him and he cannot now urge the continuances granted by the Civil Service Commission at his request as a basis for his claim.

As was said by this court in *Huwald vs. State*, 12 C. R., 305, 'to grant a discharged employee, during such period, a salary, would be against public policy and would encourage every discharged employee, no matter for what cause he might have been discharged, to file a complaint * * * and then cause a delay and postpone final action by the Commission as long as possible, knowing that the longer the matter could be delayed, the more money he would receive for which no service was rendered.'

This claimant has failed, under the law, to establish his right to an award. Complaint dismissed.

(No. 3730—Claimant awarded \$844.80.)

PAUL R. BOLGER, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944.

JAMES F. HENNESSY AND WILLIAM E. PERCE, for claimant.

GEORGE F. BARRETT, Attorney General; ROBERT V. OSTROM, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim for loss of vision in left eye — accidental injury arising out of and in course of employment—extent of liability—how determined*, Where it appears that prior to the injury the claimant had normal vision in both eyes; that as a result of the accident claimant has suffered a forty per cent loss of vision in his left

eye without glasses; that he has suffered a twenty per cent loss of vision with glasses, the sound rule, followed by a majority of the courts, is that compensation for eye injuries is properly determined on actual loss of vision rather than loss of vision as corrected by lenses.

ECKERT, J.

On October 8, 1941, the claimant, Paul R. Bolger, was an employee of the Department of Public Welfare of the State of Illinois, at the Elgin State Hospital. While sharpening his carpenter's hatchet on an emery wheel, a foreign body entered his left eye in the center of the cornea, resulting in a permanent partial loss of vision.

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Claimant's wages for the year immediately preceding the injury were \$2,520.00; he had two children under sixteen years of age dependent upon him for support. No claim is made for medical, hospital, or surgical services, or for temporary total or temporary partial disability, but claim is made for eighty per cent loss of sight in claimant's left eye.

From the record it appears that prior to the injury claimant had normal vision in both eyes ;that as a result of the accident, claimant has suffered a forty per cent loss of vision in his left eye without glasses ;that he has suffered a twenty per cent loss of vision with glasses. Claimant contends that under the Workmen's Compensation Act his loss is to be determined without correction rather than with correction by glasses.

There is nothing in the Workmen's Compensation Act to indicate a contrary construction. To base dis-

ability in an eye case on the condition of the eye after correction is 'asillogical as to hold that compensation in a leg or arm case should be determined on the extent of the disability after the attachment of a brace or other appliance. -Although courts in several States determine eye losses after correction, the sound rule, followed by a majority of the courts, is that compensation for eye injuries is properly determined on actual loss of vision rather than loss of vision as corrected by lenses. Under the Illinois statute, the purpose of which was to provide compensation for accidental injuries or death suffered in the course of employment, such loss should be determined without reference to the correction.

The court finds that claimant has suffered a forty per cent loss of vision of 'his left eye. On the basis of claimant's earnings and his dependents, he is entitled to an award of \$16.00 per week for 48 weeks, or the sum of \$768.00. Since the injury occurred subsequent to July 1, 1941, the award must be increased ten per cent, or \$76.80, making a total of \$844.80.

Award is therefore entered in favor of the claimant for the total sum of \$844.80, all of which has accrued and is payable forthwith.

(No. 3773—Claim denied.)

JOHN W. GERHARDT, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed September 12, 1944.

DEWITT S. CROW, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for respondent.

MOTOR FUEL TAX—*Refunds.* Time within which claims must be filed. Chapter 120, Section 429 of Ill. Rev. Statutes, 1943, provides a

remedy and fixes the time within which the same may be availed of and the Court of Claims has no jurisdiction to extend such time. Claimant did not present a proper claim within a six months period fixed by the Statute.

PRINCIPAL AND AGENT—*a claimant is not in a position to excuse his failure, to comply with the terms of the statute because of the negligence of his own agent.*

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint charges that claimant was, in the years 1940 and **1941**, operating a farm near New Berlin, Illinois. It is further alleged that he purchased **4,613** gallons of gas during those years which were used by him for farming purposes, and the fuel tax of three cents per gallon was paid by him on that amount of gas, and that he had not received a tax refund from the Department of Finance at the time of the filing of said complaint.

The complaint further alleges that all sales slips issued to him for periodic purchases were left with one Ben Roesch, a distributor of the Standard Oil Company in that locality, to be filed with the proper department of the respondent for the purpose of securing a refund, but that the said Ben Roesch negligently failed to file the sales slips as was directed of him by claimant to secure a refund of said tax.

The record consists of the complaint, a stipulation and the instruments referred to therein, including a report of the Motor Fuel Tax Division of the Department of Finance, which substantially verifies the allegations in said complaint.

Paragraph **3** of said stipulation reads as follows: "That the claimant did not file any claim, for motor fuel gas refund with the Department of Revenue of the State of Illinois, within six months after the date on which the said motor fuel was used by the claimant."

Paragraph 5 of said stipulation is as follows : "That the foregoing paragraphs 1, 2, 3 and 4 of this stipulation and the report of the Department of Finance, dated February 3, 1943, which has heretofore been filed, shall constitute the record in this case."

The Attorney General has made a motion to dismiss this complaint.

Chapter 120, Section 429 of the Ill. Rev. Stat., 1943, provides as follows :

"Any person who loses motor fuel through any cause or uses motor fuel (upon which he has paid the amount required to be collected under this act) for any purpose other than operating a motor vehicle upon the public highways of this State, shall be reimbursed and repaid the amount so paid.

"Claims for such reimbursement shall be made to the Department of Finance, duly certified by the affidavit of the claimant, or one of the principal officers if the claimant is a corporation, upon forms prescribed by the department. The claims shall state such facts relating to the purchase, importation, manufacture or production of the motor fuel by the claimant as the department may deem necessary, and the time when, and the circumstances of its loss or the specific purpose for which it was used (as the case may be). Claims for reimbursement must be filed not later than six months after the date on which the motor fuel was lost or used by the claimant."

In *Silver-Burdette Company vs. State*, 8 C. C. R., 539, this court held that where a statute provides a remedy and fixes the time within which the same may be availed of, the Court of Claims has no jurisdiction to extend such time.

Claimant did not present a proper claim within a six months period fixed by the Statute, and it is stipulated in this record that the person upon whom claimant relied to file, negligently failed to file for him.

Claimant contends that a fraud was perpetrated on him by the agent of the Standard Oil Company at New Berlin, Illinois, and that the fraud was not discovered by claimant until the statutory period of time had elapsed for filing of claim with the Department of Revenue.

The claimant, having appointed the said Ben Roesch as his agent, is not now in a position to excuse his failure to comply with the terms of the Statute because of the negligence of his own agent.

The claimant, not having justified his delay in seeking a refund, the motion of the Attorney General must be sustained and the cause dismissed.

(No. 3807—Claimant awarded \$1,423.82.)

LOUIS E. MITCHELL, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion. filed September 12, 1944.

CHARLES R. MYERS, for claimant.

GEORGE F. BARRETT, Attorney General; ROBERT V. OSTROM AND C. ARTHUR NEBEL, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where it appears an employee of the State sustained a bruise on the palm of his left hand, and because of subsequent infection, it became necessary to amputate the second finger of his left hand, arising out of and in the course of employment, while within the protection of the Workmen's Compensation Act, an award may be made therefor, in accordance with the provision of said Act upon compliance with the requirements thereof.

ECKERT, J.

On June 3, 1942, claimant, Louis E. Mitchell, was an employee of the Department of Public Works and Buildings of the State of Illinois, Division of Highways. While pushing a wheelbarrow loaded with stone chips to be used in a bituminous mixture for asphalt shoulders along U. S. Route No. 40, he sustained a bruise in the palm of his left hand. Because of subsequent infection, he was under the care of various doctors from June 11, 1942, to January 8, 1943. During the course of treatment, it be-

came necessary to amputate the second finger of his left hand; the remaining fingers having become stiff and strophied.

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Ad; of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Claimant had been in the employ of the Division approximately two weeks preceding the date of the injury, at a wage rate of 55 cents per hour. Eight hours constituted a normal working day, and employees of the Division engaged in the same capacity and at the same rate as claimant are employed less-than two hundred days a year. At the time of the accident claimant had no children under sixteen years of age dependent upon him for support. The basis for determining compensation is therefore a weekly wage of \$16.92.

Claimant was temporarily totally disabled from June 3, 1942, to January 8, 1943, a period of 31-2/7 weeks, and was paid compensation in the total amount of \$270.48. During this period, however, he was entitled to compensation in the amount of \$291.27, so there remains due to him on account of temporary total disability the sum of \$20.79.

No claim is made for medical, hospital, or surgical services, but claim is made for total loss of use of claimant's left hand. It is undisputed that he has lost the second finger by amputation, and has suffered serious injury to the first, third, and fourth fingers, and to the tissues of the palm of the hand. Although the original injury appeared slight, the resulting infection was very serious, due partly to the fact that claimant at the time

suffered from diabetes. On August 7, **1942**, Dr. J. Albert Key, Professor of Orthopedics at Washington University, St. Louis, reported to the respondent as follows:

"* * * Physical examination—the left hand is considerably swollen; the stump of the middle finger is covered by a granulating wound which is infected; there are two small granulating wounds on the dorsal surface of the hand, apparently old drainage incisions; and there are also sinuses in the palm of the hand at the base of the middle finger. The palm of the hand is distended and when pressure is made on the palm, thick yellow pus exudes from the sinus at the base of the middle finger. There is an infected wound on the tip of the thumb; the index, ring and little fingers are contracted, hyper-extended at the base and flexed at the terminal joints. * * *"

On December 3, **1942**, Dr. Key again reported:

"I examined Mr. Louis E. Mitchell on November 17. He still has marked disability of his hand, the flexor tendons of the index and ring fingers having been completely destroyed by the infection and all of the soft tissues of the hand having been severely damaged. * * *"

From the medical reports and from personal observation of the claimant, the court is of the opinion that claimant has suffered a ninety per cent loss of use of his left hand. He is therefore entitled to the sum of **\$8.46** per week for a period of **153** weeks, or the total sum of **\$1,294.38**. Since the injury occurred subsequent to July 1, **1941**, the award must be increased ten per cent or **\$129.44**, making a total of **\$1,423.82**.

Award is therefore entered in favor of the claimant for the total sum of **\$1,444.61** to be paid to him as follows:

(1) The sum of **\$859.18** which has accrued and is payable forthwith.

(2) The sum of **\$585.43** payable in **62** weekly installments of **\$9.31** each, beginning September 12th, **1944**, with a final payment of **\$8.21**.

(No. 3831—Claim denied.)

ARTHUR HOLLENDER, WILLIAM D. FOWLER, JOHN W. OSWALD, E. L. SOPER, AND ANNA LOUISE KLINE, ADMINISTRATRIX OF THE ESTATE OF CLARENCE R. WILSON, DECEASED, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944

WARNER AND WARNER, for claimants.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SALARIES—*when claim for increase will be denied.* Where claimants, for the period involved, received their regular monthly salary warrants for their services and accepted the same, they are barred from recovering additional compensation for their services for the same period. Section 9, sub-section 3 of "An Act in relation to State Finance" (Chapter 127, Ill. Rev. Statutes Sec. 145).

UNION WAGES—*When State not bound to 'pay' increases.* Merely because the contractors in the locality agreed to recognize and pay an increase in the hourly wage demanded by the union, the State, not having been a party to the negotiation, is not bound to pay the same unless and until it agrees to do so.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

This complaint was filed on February 5, 1944, and alleges that the above named claimants were employed by the respondent at the Dixon State Hospital, Dixon, Illinois, as plumbers and steam fitters. Anna Louise Kline appears as claimant as administratrix of the estate of Clarence R. Wilson, deceased.

The claim of each is based on services rendered to the respondent as plumbers and steam fitters; all being members of Local Union No. 411 of the United Association of Journeymen Plumbers and Steam Fitters of the United States and Canada, said local union being located in Dixon, Illinois.

Claimants Arthur Hollender, William D. Fowler, and John W. Oswald seek an award of \$400.40 each; E.

L. Soper, claimant, seeks an award of \$110.50; and Anna Louise Kline, administratrix of the estate of Clarence R. Wilson, deceased, seeks an award of \$223.60.

The complaint alleges that the claimants were for a number of years members in good standing of said local union, and that said union, on May 30, 1942, made an agreement with the contractors of Lee County, Illinois, increasing their members' wages from \$1.37½ per hour to \$1.70 per hour. The complaint further alleges that a notice was mailed to Rodney H. Brandon, Director of the Department of Public Welfare, a copy of which is attached to said complaint, notifying the said Director of the action of the union in increasing the then prevailing rate. Considerable correspondence was had between the union and various departments of the respondent from the 30th day of May, 1942, to the 1st day of November, 1943, in an effort to have their new wage rate recognized by the respondent. This correspondence is attached to said complaint and identified as Exhibits A to K, inclusive.

The complaint further alleges that all of the claimants from May 30, 1942, to January 1, 1943, received vouchers from the respondent for work performed by each of them at a rate of \$1.37½ per hour for that period. Vouchers for work performed were accepted by each claimant and cashed.

The complaint further alleges that on and after January 1, 1943, the respondent recognized the increased rate of \$1.70 per hour, and subsequent to that date has paid the members of said local union at that hourly rate.

The respondent files a motion to dismiss the complaint for the reason the complaint shows on its face that claimants accepted and cashed warrants for the services rendered and that no legal recovery for further or addi-

tional salary can be had under the law, and cites Section 19, Article 4 of the Constitution, 1870; *Par. 145, subsection 3, Chapter 127*, Ill. Rev. Stat., in support of 'said motion.

The claimants in their statement, brief and argument opposing the respondent's motion to dismiss, contend that the claimants are not seeking extra compensation for work already performed, but the balance of the wages which they were entitled to at the time' the services were rendered and for which they believed they were working at all times subsequent to May 30, 1942. They further contend that the union wage scale of \$1.70 per hour fixed on May 30, 1942, and recognized by the Contractors of Lee and Whiteside County and of the City of Oregon, was recognized as the general prevailing rate per diem in the locality of the Dixon State Hospital, where claimants were employed, and consequently the rate which public policy, as expressly stated by the legislature, required the State of Illinois to pay, and cite *Townsend vs. Gash*, 267 Ill. 578; and Section 1 of an Act relating to wages of laborers, mechanics and other workmen employed under contracts for public work, *Chapter 48, par. 39s p. Ill. Rev. Stat.*

Upon a full consideration of the record we must conclude that these claimants are attempting to collect additional wages for work already performed under the action of their local union of May 30, 1942, increasing their rate of pay, and which they attempt to show is binding on the respondent. We cannot agree with this contention. This increase in hourly wage rate did not arise from a negotiated contract with the respondent but was an action taken solely on the behalf of the local union for the benefit of its members and while it is probably true, as alleged in the complaint, the contractors in Lee

County, Illinois recognized the \$1.70 per hour as the prevailing rate, and no doubt recognized it under any contracts negotiated between the union and contractors after the rate was raised, yet the complaint does not allege that the State of Illinois entered into any binding contract through any of its officers until the 1st day of January, 1943.

This court, under the law as it now exists, is precluded from making an award to these claimants under this record. Section 9, subsection 3 of "An Act in relation to State Finance" (Chap. 127, Ill. Rev. Stat., Sec.

145), provides :

"Accounts paid from appropriations for personal service of any officer or employee of the State, either temporary or regular, shall be considered as the full payment for all services rendered between the dates specified in the payroll or other vouchers and no additional sum, shall be paid to such officer or employee from any lump appropriation, appropriation for extra help or other purpose of any accumulated balances in specific appropriations, which payments would constitute in fact an additional payment for work already performed, and for which remuneration had already been paid."

Under this provision of the Statute, it was held in *Mills vs. State*, 9 C. C. R. 69, that a claimant cannot accept warrants purported to cover the full amount due him for services during stated periods, and thereafter, when his active service has ended, obtain an award from the State for an additional amount for those periods for which he had apparently been paid for services in full.

In *Broderic, et al, vs. State*, 9 C. C. R. 461, the Court held :

"Claimants herein in each instance throughout their terms of service received regular monthly salary warrants from the State of Illinois and accepted same from month to month as received. Regardless of any rights which they may have had to have demanded and received salary in any other amounts, claimants accepted said monthly warrants regularly through their term of service."

The court held in that case that claimants, having accepted the monthly warrants, were barred by the Statute from obtaining any further payments of salary. The claims were denied. *Klapman, et al, vs State*, No. 3210; *Goldsen vs. State*, 12 C. C. R. 26.

It appearing from the complaint that the claimants accepted payment for the services performed, it is clear that they are now barred from recovering additional, compensation for these services. .

We hold that the decisions of this court as cited are controlling in the instant claim and that the claimants are, and each of them is barred from securing an award.

The motion of the Attorney General is allowed and the complaint is dismissed.

(No. 3337—Claimant awarded \$48.57.)

PHILLIPS PETROLEUM Co., A CORPORATION. Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944.

RAEBURN L. FOSTER AND CECIL L. HUNT, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SUPPLIES—*lapse of appropriation before payment—sufficient unexpended balance in—when award may be made for value of.* Where merchandise is sold to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is **not** approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there was sufficient funds remaining therein to pay same.

ECKERT, J.

During the period from April 27, 1943, to June 26, 1943, the Department of Public Works and Buildings of

the State of Illinois, Division of Highways, purchased and received gasoline, kerosene and lubricating oil in the value of **\$48.57** from the claimant, Phillips Petroleum Company. Invoice No. **8702** in the amount of **\$2.16**, for gasoline, was presented on October **13, 1943**, to R. T. Cash, District Engineer; invoice No. **4035** in the amount of \$6.76, for kerosene, was presented on October 5, **1943**, to **O. F. Goeke**, District Engineer; the remaining invoices upon which the claim is based, in the total amount of **\$39.65**, for gasoline and lubricating oil, were presented on November **22, 1943**, to **C. I. Burggraph**, District Engineer. The quantities, qualities, prices and points of delivery of these supplies were in accordance with a previous agreement between the claimant and the Division of Highways. The invoices were presented for payment in the usual course of business, but were not paid because the appropriation therefor had lapsed on September **30, 1943**.

Claimant has furnished supplies for the respondent, the purchase of which was properly and duly authorized; claimant submitted its invoices to the respondent within a reasonable time and has not received payment; such non-payment is due to no fault on the part of the claimant; when the charges were incurred there remained a sufficient unexpended balance in the appropriation from which payment could have been made. Claimant is, therefore, entitled to an award. (*Koppein vs. State*, 12 C. C. R. 395.)

An award is therefore made in favor of the claimant in the sum of **\$48.57**.

(No. 3852—Claim denied.)

LEAH M. WILLMS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944

HARRY B. HOFFMAN, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SALARY—When services unauthorized—claim for compensation denied. Where it appears that the claimant's services were performed subsequent to the period in which the appropriation ceased to be effective, it is clear that the employment was unauthorized and the claim for compensation is denied. Section 25 of "An Act in relation to the State Finance." (Chap. 127, par. 161, Ill. Rev. Statutes, 1943.)

ECKERT, J.

On August 1, 1942, the claimant, Leah M. Willms, was employed as a stenographer and secretary to the Director for Peoria County of the Governor's Committee on Re-employment, at a salary of Eighty-five Dollars (\$85.00) per month. This Committee was organized in 1941, and an appropriation of \$150,000 was made to it by the 62nd General Assembly. The Committee's existence terminated on June 30, 1943.

Claimant alleges that she continued in her employment until September 1, 1943, when she resigned because of non-payment of salary for the months of July and August, 1943. Claim is made for One Hundred Seventy Dollars (\$170.00).

The respondent has filed its motion to dismiss the complaint on the ground that it fails to state a cause of action because the alleged services upon which the claim is based are not alleged to have been performed at a time during which services were authorized and at a time during which an appropriation was available for payment. Section 25 of "An Act in relation to the State Finance" provides that:

“When an appropriation shall be made without restriction as to the time of its use, it shall be available for expenditure for the purposes and to the amount therein stated, from the date that the Act becomes effective to and including the thirtieth day of June of the year in which the next General Assembly shall convene.” (Chap. 127, par. 161, Illinois Revised Statutes, 1943.)

The appropriation for the payment of claimant's salary was thus available from June 30, 1941, the date that the Act making the appropriation became effective, to and including the 30th day of June, 1943. Claimant's services were rendered during July and August, 1943. The General Assembly made no appropriation to the Committee from which a salary for services rendered after June 30, 1943, could be paid.

The question presented to the court is not one of payment for services properly and duly authorized, for which payment was not made until after the lapse of the appropriation. It is, therefore, immaterial whether or not there remained a sufficient unexpended balance in the appropriation from which payment could have been made. The cases cited by claimant are cases involving claims for services rendered during a time when such services were authorized.

(*French vs. State*, 9 C. C. R., 463; *City of Shelbyville vs. State*, 9 C. C. R., 518.)

Under Section 25 of “An Act in relation to the State Finance,” (supra) the employment of the claimant after June 30, 1943, was unauthorized. Respondent's motion to dismiss is therefore granted.

Case dismissed.

(No. 3857—Claimant awarded \$162.85.)

ILLINOIS BELL TELEPHONE CO., A CORPORATION, Claimant, *vs.*
STATE OF ILLINOIS, Respondent.

Opinion filed September 12, 1944.

BEN B. BOYNTON, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for respondent.

TELEPHONE SERVICE—lapse of appropriation, before payment—sufficient unexpended balance in—when award may be made for value of. Where telephone services are rendered to the State, on its order, and received by it and claimant submits a bill' in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there was sufficient funds remaining therein to pay same.

ECKERT, J.

During the months of May and June, 1943, claimant furnished telephone service at its Blue Island Exchange to the Department of Public Works and Buildings, Division of Highways, of the State of Illinois, pursuant to a contract with the Department. Exchange service furnished by the claimant from June 21, 1943, to June 30, 1943, was in the amount of \$6.80 and toll service furnished by the claimant from May 21, 1943, to June 30, 1943, was in the amount of \$156.05, or a total of \$162.85.

Invoices for these services were presented for payment in the usual course of business. Due to shortage of clerks and turn over of personnel in the district office of the Division of Highways, the invoices did not reach the central office until after September 30, 1943, after the lapse of the appropriation.

Claimant has furnished properly and duly authorized services for the respondent; claimant submitted its invoices to the respondent within a reasonable time, and

has not received payment ; such non-payment is due to no fault on the part of the claimant; when the charges were incurred there remained a sufficient unexpended balance in the appropriation from which payment could have been made. Claimant is, therefore, entitled to an award. (*Koppein vs. State*, 12 C. C. R., 395.)

An award is therefore made in favor of the claimant in the sum of \$162.85.

(No. 3560—Award modified.)

FRANCES CURE, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Order filed November 14, 1944.

WORKMEN'S COMPENSATION ACT—*when remarriage of widow of employee extinguishes right to further compensation.* Under Section 7, par. (a) of the Workmen's Compensation Act, a widow's right to compensation ceases on the day of her remarriage, the decedent having left no children under the age of sixteen years at the time of his death.

In an opinion heretofore filed in this cause at the February, 1941, Term of this Court, claimant was allowed an award of Four Thousand (\$4,000.00) Dollars for the death of her husband during the course of his employment for the respondent.

The matter now comes before the Court on the suggestion of the marriage of claimant, Frances Cure, who reports to this Court that she was remarried on the 10th day of August, 1944.

Payments have been made on this award up to August 12, 1944, leaving an unpaid balance of this award in the sum of \$1,862.84.

Under Section 7, paragraph a of the Workmen's Compensation Act, claimant's right to compensation ceases on the day of her marriage, to-wit, August 10, 1944, the decedent having left no children under the age of sixteen years at the time of his death.

It is therefore ordered that the award heretofore entered in this cause be extinguished and held for naught.

(No. 3813—Claimant awarded \$4,895.00.)

ROSE K. ZIMMER, Claimant, *vs.* STATE OF ILLINOIS. Respondent.

Opinion filed November 14, 1944.

EDGAR O. ZIMMER, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made for death of employee thereunder. Where an employee of the State sustains accidental injuries, arising out of and in the course of his employment, while within the protection of the Workmen's Compensation Act, **resulting** in his death, an award may be made for compensation therefor to those legally entitled thereto, in accordance with the provisions of the Act upon compliance with the requirements thereof.

ECKERT, J.

Claimant, Rose K. Zimmer, is the widow of Otto F. Zimmer, deceased, formerly employed by the Department of Public Safety, as an attendant, at the Illinois Security Hospital, Menard, Illinois. About eleven-thirty o'clock on the evening of June 20th, 1943, while acting as relief turnkey, the deceased was struck on the head by an escaping inmate of the institution. Death occurred six hours later. Zimmer was married, and left him surviving his widow, the claimant, and his son, Carlisle A. Zimmer, a minor, twelve years of age. Claimant seeks an award in the amount of \$4,895.00.

The deceased having been first employed by the respondent on December 12th, 1942, less than one year prior to the injury, compensation under Section 10(c) of the Workmen's Compensation Act must be computed according to the annual earnings of employees of the

same class in the same employment and location during the year immediately preceding the injury. The annual earnings of such employees were \$1,800.00.

At the time of the accident, employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the decedent's employment.

Claimant is entitled to an award under Section 7(a) of the Workmen's Compensation Act in the amount of \$4,450.00. The death having occurred as a result of an injury sustained after July 1, 1941, and before July 1, 1943, this amount must be increased ten per cent, or **\$445.00.**

Award is therefore made in favor of the claimant, Rose K. Zimmer, in the amount of \$4,895.00 to be paid to her as follows:

\$1,204.50 which has accrued and is payable forthwith.

Balance of \$3,690.50 is payable in weekly installments of \$16.50 per week beginning November 14, 1944, for a period of 223 weeks with an additional final payment of \$11.00.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

(No. 3833—Claimant awarded \$119.34.)

THE PEOPLE'S Gas LIGHT AND COKE CO., A CORPORATION,
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed November 14, 1944.

DAILEY, DINES, WHITE & FIEDLER, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L.
MORGAN, Assistant Attorney General, for respbndent.

SUPPLIES—lapse of appropriation before payment—sufficient unexpended balance in—when award may be made for value of. Where merchandise is sold to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is not approved and vouahered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there was sufficient funds remaining therein to pay same.

INTEREST—not allowable. There is no statute in this State authorizing the payment of interest on claims.

ECKERT, J.

Claimant seeks an award for \$119.34 for one Servel Electrolux Refrigerator, No. 46604, with pressure regulator, sold February 10, 1942, to the Department of Public Health of the State of Illinois, and delivered to the Cook County Public Health Unit. The purchase was properly authorized by Edward Davis, State Purchasing Agent for the Division of Purchases and Supplies of the State of Illinois; claimant has not received payment; such non-payment is due to no fault on the part of the claimant; when the charge was incurred, there remained a sufficient unexpended balance in the appropriation from which payment could have been made. Claimant is therefore entitled to an award. *Shippers Fuel Corporation vs. State*, 12 C. C. R. 323.

Claimant also seeks interest on \$1 9.34 at five per cent per annum from February 10, 1942. The State, how-

ever, is not liable for the payment of costs or interest, there being no statute in this State authorizing such payment. *Phillips Petroleum Company vs. State*, 10 C. C. R. 319; *Southern Kraft Corporation vs. State*, 9 C. C. R. 306.

An award is therefore entered in favor of the claimant in the sum of **\$119.34**.

(No. 3863—Claimant awarded \$184.08.)

THE BORDEN Co., A CORPORATION, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed November 14, 1944.

LATHROP, W. HULL, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

LICENSE FEES—*payment of amount in excess of that lawfully due, under mistake of fact, may be recovered. Where it appears that a corporation duly licensed to do business in the State of Illinois makes a payment of license fees and taxes in excess of that lawfully due, under a mistake of fact, the excess payment may be recovered.*

CHIEF JUSTICE DAMRON delivered the 'opinion of the court:

The claimant seeks an award in the sum of One Hundred Eighty-four Dollars and Eight Cents (**\$184.08**), for a refund which it inadvertently paid to the Division of Foods and Dairies, Department of Agriculture, of the State of Illinois.

The record consists of the complaint, filed on June 30, 1944, which is duly verified; bill of particulars on behalf of claimant; report of the Division of Foods and Dairies, Department of Agriculture; waiver of right to present evidence; testimony and oral argument on behalf of claimant; and waiver of its right to file brief.

The record shows that claimant is a New Jersey corporation and is duly licensed to do, and is doing business, in the State of Illinois, engaged in the business of manufacturing, selling and distributing dairy food products and various articles of food for human and animal consumption in various states of the Union, including this State.

The complaint further alleges that during the six months period, commencing January 1, 1943, and ending June 30, 1943, claimant sold in the State of Illinois, among other food products, some concentrated commercial feeding products known as "Flaydry,)" "Flaydry 400-D," and "Hopro," in the amounts as follows: "Flaydry"—1414½ tons; "Flaydry 400-D"—85¼ tons; "Hopro"—341-3/20 tons.

It further alleges that pursuant to the requirements and provisions of Section 53.168, subsection 8 of the Statute of the State of Illinois, relating to food (Jones Ill. Stats. Ann., Vol. 10), claimant paid to the treasurer of the State of Illinois a license fee of \$25.00 for the year 1943 for each of said trade named products, and was duly issued and received licenses or certificates from the Department of Agriculture of the State of Illinois. That on or about the 15th day of July, 1943, claimant procured from the Department of Agriculture, Division of Foods and Dairies of the State of Illinois, a license to sell the above named commercial food stuffs and submitted to said Department a report in the form of an affidavit and statement, together with claimant's check for \$198.92, in payment of a license fee of \$1.00 for each and every brand of such feed stuffs, and inadvertently included "Flaydry," "Flaydry 400-D" and "Hopro," and a further license fee of ten cents per ton on 1988 plus tons of such feeding stuff sold by claimant in this State during

the period of January 1, 1943, to June 30, 1943, inclusive, and thereafter claimant was issued and received such license in the form of a receipted duplicate report, affidavit and statement, as more specifically appears from the photostatic copy of said report, marked Exhibit B and-made a part of the complaint, which was an over-payment inasmuch as claimant had previously paid a license fee amounting to \$25.00 each on said products.

The report of the Division of Foods and Dairies, Department of Agriculture, above referred to, in paragraph 3 states:

“It further appears from the records of the Division of Foods and Dairies, Department of Agriculture, that during the month of July, 1943, the claimant included the tonnage of the above described concentrated commercial feeding stuffs in a feed tonnage report made to said Division of Foods and Dairies, Department of Agriculture, and paid thereon in error a tonnage tax in the amount of \$184.08. The check received in payment of this tonnage tax was deposited to the credit of the Treasurer of the State of Illinois by said Division of Foods and Dairies, and said over-payment was not discovered until the check had cleared and been paid.”

Paragraph 7 of said report is as follows:

“It would appear that the facts submitted by the claimant are substantiated by the records of the Division of Foods and Dairies, Department of Agriculture and, further, that the claimant is entitled to refund of the sum of \$184.08 which has been paid to the Treasurer of the State of Illinois in error.”

It clearly appears from the record in this case that the money for which claim is made was paid to a Division of the State as the result of a mistake of fact and is the property of claimant.

This court has repeatedly held that where a claimant makes a payment to the respondent in excess of that lawfully due, made under mistake of fact, may be recovered. *Eureka-Maryland Assurance Corporation vs. State*, 12 C. C. R., 418. *Preisel vs. State*, 12 C. C. R. 320.

An award is therefore entered in favor of claimant the Borden Company, a corporation, as a refund, in the sum of One Hundred Eighty-four Dollars and Eight Cents (\$184.08).

(No. 3694—Claimant awarded \$770.50.)

JAMES RALPH KOPP, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed January 9, 1945.

EMERSON G. WHITNEY AND JOSEPH D. TEITELBAUM,
for claimant.

GEORGE F. BARRETT, 'Attorney General; WILLIAM L.
MORGAN, Assistant Attorney General,. for respondent.

WORKMEN'S COMPENSATION ACT—*When award may be made under.*
Where employee of State sustains accidental injuries, arising out of, and in the course of his employment, an award may be made for compensation therefor, in accordance with the provisions of the Workmen's Compensation Act, upon compliance by said employee with the requirements thereof.

ECKERT, J.

On August 13; 1941, the claimant, James Ralph Kopp, employed by the State of Illinois, Division of Highways, as a laborer, sustained an injury to his left shoulder while cranking the motor of an air compressor which backfired.. At the time of the accident he had two children under the age of sixteen years, and had been employed by the respondent since July 13, 1941, at the rate of sixty cents an hour. Employees of the Division engaged in the same capacity and at the same rate as claimant are employed less than two hundred days a year ;eight hours constitute a normal working day.

Immediately following the accident, claimant reported his injury to William E. Johnson, foreman of the

crew to which Kopp belonged, but Johnson failed to report the accident to the District Office until September 3, 1941. Johnson, two days after the accident, sent claimant to Dr. Louis River of Oak Park, Illinois, who in turn engaged the services of Dr. Arthur H. Conley of Chicago as a consultant and assistant. The Division received reports of the injury from both Dr. River and Dr. Conley on November 18, 1941. From these reports, it appeared that treatment, consisting of sling, massage, heat, and short-wave physiotherapy, produced only a slight improvement, and that on September 10th a cast was applied for a period of one month. The report of Dr. River also stated that claimant had done most of his work since the injury, and that the only permanent disability expected was a moderate weakness of abduction of the arm.

On November 10, 1941, the Division ordered the claimant to report to Dr. H. B. Thomas, Professor of Orthopedics, University of Illinois Medical College, for treatment. From the report of Dr. Thomas, made to the Division on December 17th, it appears that Dr. Thomas saw claimant only once; that subsequently claimant received physiotherapy treatments, the last of which was on December 5, 1941; that claimant was quite nervous, and several times telephoned he was unable to come to Dr. Thomas' office. He was dismissed by Dr. Thomas without final examination. The report questions claimant's disability at the time of the report and states:

"Our history is that he worked after he thought his shoulder was dislocated. This usually does not happen. Since he has not kept up his treatment we are dismissing him. Kopp's excuse for being absent is that he has to work all the day. He works ten hours a day and has not time to come in. Last time he was treated he complained of some pain in the shoulder but had full range of motion."

William E. Johnson, the foreman, turned in straight time for the claimant to the District Office almost daily

from the date of the accident through the months of September, October, and up to November 20th. From August 14th to November 19th, 1941, inclusive, the Division paid the claimant wages in the total amount of **\$340.80**, and the records of the Division indicate that claimant lost no time as a result of the accident. His employment with the Division terminated on November 20th, 1941.

The Division has also made the following payments for services rendered claimant in connection with the injury :

Dr. Louis River, Oak Park.. .. .	\$ 25.00
Dr. Robert L. French and Dr. Charles E. Franklin, Oak Park..	38.00
Dr. Arthur H. Conley, Chicago	57.00
Dr. H. B. Thomas, Chicago	31.00
Oak Park Hospital, Oak Park.	10.00
<hr/>	
Total	\$161.00

A bill for \$28.00 covering fourteen treatments rendered claimant by the physiotherapy Department of the **Oak Park Hospital** under direction of Dr. French and Dr. Franklin from August 20th to September 9th, 1941, inclusive, has not been paid.

Claim was filed in this court on March 10, 1942. Respondent thereafter filed a motion to dismiss on the ground that no claim for compensation was made within six months after the date of the accident as required by the terms and provisions of Section 24 of the Workmen's Compensation Act of this State. This motion, however, was denied. At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Claimant contends that as a result of the accident he can not do heavy work; that his arm and shoulder are still painful; that he is not able to do any work that requires motion above the shoulder or puts a strain on the arm; that he can not lift with his left arm; that he is a laborer with no skilled trade and has been unable to obtain work because of the injury. He claims no temporary disability, but claims a twenty-five per cent permanent loss of use of his left arm and shoulder. He contends that because he earned \$26.40 per week and at the time of the accident had two children under the age of sixteen years, his compensation should be calculated at sixty per cent of \$26.40, or **\$15.84** per week; that complete loss of use of an arm is compensated on the basis of 225 weeks; that 25% of 225 weeks is 56.25 weeks; that 56.25 weeks at \$15.84, aggregate \$891.00, due claimant. Claim is also made for a fee of \$75.00 to Dr. Justin Fleischmann and for \$15.00 to the American Hospital for x-rays. . . .

Upon direct examination, Dr. River testified that he first examined claimant on August 15, 1941; that claimant was sent to him by foreman, William Johnson; that claimant complained of pain in his shoulder, of an inability to carry his arm away from the body, and of an inability to abduct his arm without severe pain and tenderness; that the only positive physical finding was some swelling and considerable tenderness underneath the left acromion. The tests made for tear of the supraspinatus tendon were negative, so that the diagnosis was an injury to the superior capsule of claimant's left shoulder joint but without a disruption of the supraspinatus tendon. On cross-examination, Dr. River testified that the ligamentous capsule, that binds the arm to the socket on the shoulder blade, had been torn across the upper part.

Dr. Justin Fleischmann was called as an expert witness on behalf of the claimant. Dr. Fleischmann testified that he first examined claimant on March 1, 1942, six months after the injury; that claimant then had a decreased muscular power of arm muscles and muscle grooves of the left upper extremity, especially so the muscles which control abduction. Claimant was also subjected to neurological examination by Dr. Fleischmann, and the resulting diagnosis was laceration of the articular capsule of the left shoulder, a partial evulsion of the brachial plexus with consecutive neuritis of the radial and ulnar nerve, and a slight neuritis of the lumbosacral plexus at left.

From the medical testimony and from personal observation of claimant, it appears that claimant has suffered a twenty-five per cent permanent partial loss of use of his left arm. Claimant having been employed by the respondent only one month prior to the accident, and employees of the Division engaged in the same capacity and at the same rate as claimant having been employed less than two hundred days a year, claimant's compensation must be determined in accordance with the provisions of Section 10 of the Workmen's Compensation Act. Sixty cents per hour, eight hours per day, for two hundred days at \$4.80 per day, is an annual wage of \$960.00, and an average weekly wage of **\$18.46**. Claimant having two children under the age of sixteen years at the time of the accident, he is entitled to an award of the minimum of \$12.00 per week for 25% of 225 weeks, or \$12.00 per week for 56.25 weeks, being the sum of \$675.00. Since the accident occurred after July 1, 1939, the amount of compensation must be increased ten per cent, making a total sum of \$742.50.

Claimant is also entitled to an award in the amount of **\$28.00** for physiotherapy treatments which he received at the Oak Park Hospital. No award, however, can be made for the services of Dr. Justin Fleischmann or the services of the American Hospital inasmuch as these were entirely unauthorized by the respondent.

An award is therefore made to the claimant in the sum of \$770.50, payable as follows :

- a. **\$28.00** for the use of the Oak Park Hospital.
- b. **\$742.50** to claimant, all of which is accrued and is payable forthwith.

(No. 3734—Claimant awarded \$326.00.)

EUGENE N. MUELLER, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed January 9, 1945.

WILLIAM C. CONNOR, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SAURY—when claim for will be sustained. Where it appears that claimant was a duly certified Civil Service employee on the eligible list, he should have been employed when a vacancy was created.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

Eugene N. Mueller, the above named claimant, was employed as an investigator by the Department of Conservation of this State, at a salary of **\$125.00** per month. That he was a duly certified Civil Service employee in the classified service of the State of Illinois, as an investigator as aforesaid.

The complaint further avers that this claimant, among others not having been assigned for duty in said

Department of Conservation, filed a petition in the Circuit Court of Cook County entitled *People ex rel Goldsmith, et al, vs. Osborne, et al, #41C1309*, and on August 6, 1941, a writ of mandamus was issued out of said court compelling the Director of Conservation to reinstate the claimant to the position of investigator in the Department of Conservation and to pay him the salary lawfully appropriated therefor.

The complaint further alleges that thereafter from August 6, 1941, to January 19, 1942, claimant was employed in said Department as an investigator and on the last mentioned date tendered his resignation to the Department of conservation, which resignation was accepted. It further alleges that this claimant received salary from said Department from August 6 to August 31 and for the months of September and December, 1941, at the rate of \$125.00 per month.

This claimant claims a salary for the months of October and November, 1941, and for the period of January 1 to January 19, 1942, at the rate of \$125.00 per month, amounting to the sum of \$326.00.

The record consists of the sworn complaint, copy of judgment order of the Circuit Court of Cook County, reports of the Department of Conservation by Livingston E. Osborne, its director, stipulation of the parties hereto that the reports of the Director of the Department of Conservation, dated November 2, 1942, December 2, 1942, and November 1, 1943, constitute a part of the record of this claim, and that the judgment order for the writ of mandamus in the Circuit Court above referred to also constitutes a part of the record of this claim. This stipulation further provides that the record of the Auditor of the State of Illinois shows that there was a lapsed balance in the appropriation for salary and wages

out of the Department of Conservation in the sum of \$40,289.80 as of the 30th day of September, 1943.

Neither the claimant nor the respondent file a brief, statement and argument in this case but each waives the filing of same. The above documents constitute the full and complete record.

Upon an examination of the record as we find it, it indicates that this claimant is entitled to the salary which he demands of the State inasmuch as he was a duly certified Civil Service employee on the eligible list and should have been employed when a vacancy was created. And the only reason that claimant was not employed according to the record of the Director of Conservation as an investigator for the months for which he demands salary, was for the reason that the payroll was completely filled for each of these months. The report of Livingston E. Osborne, Director, dated November 2, 1942, acknowledges that the amount due to the claimant is \$326.00.

An award, therefore, is entered in favor of claimant as follows: For the month of October and November, 1941, and for the period of January 1 to January 19, 1942, at \$125.00 per month, totalling the sum of \$326.00.

(No. 3791—Award \$400.00.)

DELLA THOMAS, PHILIP THOMAS, SR., AND DOROTHY GRANT, NEE THOMAS, PARENIS AND SISTER OF ROBERT R. THOMAS, Deceased, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1945.

Rehearing denied May 8, 1945.

WILMER L. VOGHT, for claimants.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*partial dependency — when claim for ~~wall~~ be denied.* Where it appears that the deceased employee merely lived with his parents and his sister and had not contributed to them more than was necessary for his own board and lodging, which he would have paid had he lived elsewhere, an award on the ground of dependency would not be justified. Award of \$400, to be paid into special fund of which State Treasurer is ex-officio custodian, as provided in Section 7, par. e of the Act.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

On the 13th day of May, 1942, Robert R. Thomas was an employee of the respondent in the Department of Public Safety, Division of State Police, as a State Highway Patrolman. While riding upon and operating a motorcycle owned by the respondent during the course of his employment, along and upon the concrete highway west of Collinsville, Illinois, on U. S. 40 Belt Line, he was accidentally thrown from said motorcycle receiving injuries which resulted in his death two days later.

At the time of the accident which resulted in his death, he was twenty-six years of age and received a salary from the respondent of \$175.00 per month. He was unmarried and resided in Belleville, St. Clair County with his mother, Della Thomas, his father, Philip Thomas, Sr., and his sister, Dorothy Grant.

Each of the above named are the claimants in this case for partial dependency as provided in Section 7 of the Workmen's Compensation Act.

This record consists of the complaint above referred to, departmental report of the Division of State Police, original transcript of testimony and abstract of same, claimants' statement, brief and argument, and statement, brief and argument on behalf of respondent.

The evidence discloses that the deceased was first employed by the Division of State Police on June 9, 1941, as a driver's license examiner at a salary of \$150.00 per

month. He was appointed as a police officer by the respondent on September 20, **1941**, at a salary of \$175.00 per month. The evidence further discloses that on the date of the fatal accident that the Division of State Police had immediate knowledge of the accident and of the resulting death; that claim for compensation was made within six months of the injury and that the complaint was filed within the statutory limitations, as provided by Section **24** of the Workmen's Compensation Act. The question to be decided here is whether deceased's mother, father and sister were partially dependent upon him for support as contemplated by the Compensation Act of this State.

At the hearing no one testified in support of this claim except the interested parties. The testimony shows that Dorothy Grant is the sister of the deceased and lived with her parents and her brother during most of her lifetime. She was seventeen years of age and unmarried. But subsequently on September 18, **1942**, she married and she and her husband lived with her parents for several months, making no contributions to the family income.'

Philip Thomas, Sr., the deceased's father, was employed by the Illinois Terminal Railroad in St. Clair County and had been since **1917**, earning \$150.00 per month. Della Thomas, the mother of deceased, was unemployed, but operated the home for her above named husband, daughter and the deceased.

The evidence further discloses that the deceased had always lived at home and had no regular employment prior to his appointment as a driver's license examiner. Some time subsequent to his employment, the deceased purchased an automobile on time payments and from his salary made payments of **\$32.00** per month on it.

The evidence further discloses that the salary earned by the father amounted to approximately \$1,800.00 per year, before any social security taxes or other deductions were made. That all of this amount was contributed by the father for the family upkeep and that it was his custom to hand over his paycheck to his wife. The evidence further discloses that the deceased did likewise, which made up the family funds. This family fund was administered entirely by the mother, Della Thomas, and was doled out to the claimants in accordance with their needs.

The evidence further discloses that neither the father, mother nor sister, nor deceased brother had a savings account at the time of the death of claimants' intestate.

In cases of this character, to sustain an award, the evidence must show that the contributions were relied upon by the petitioners for their means of living, judging this by their position in life, and that they were to a substantial degree supported by the employee at the time of his death. *Lederer Co. vs. Ind. Corn.*, 321 Ill. 563; *Pratt Co. vs. Ind. Corn.*, 293 Ill. 367; *Keller vs. Ind. Corn.*, 291 Ill. 314; *Peabody Coal Company vs. Ind. Corn.*, 311 Ill. 338.

After a careful consideration of the evidence offered in support of this claim, we conclude that Della Thomas merely acted as the banker for her son Robert. This is shown by the testimony of his sister, Dorothy. She testified as follows: "My brother Robert Thomas, turned over to Mother, his monthly salary during the time he worked for the State of Illinois before the accident. My father turned over his money to Mother. I seen it done. Mother pays the family bills, groceries, electric and gas, telephone and so forth. My brother Robert had no agree-

ment with Mother as what should be done with his monthly salary. When I went to the show or other places of amusement I got money from my mother. Robert did the same as I. If he wanted any money he asked my mother for it, because he turned his money over to her."

Here we find the father, one of the claimants, had a net income of approximately \$1,800.00 per year and between him and the other claimants there existed a legal obligation to support under the Statute. There was no legal obligation for support on the part of the deceased son. While it may be true that part of his earnings were spent through the family budget, yet he was not required under the law to contribute any more to the family expenses except his room and board. This he would have had to do had he lived elsewhere. Partial dependency cannot be proven from the mere fact that the decedent lived with the family and contributed to his own upkeep. There is no showing that the deceased employee has paid to the petitioners, who were his father, mother and sister, with whom he lived, any sums of money other than for board and lodging, but the evidence does show that the petitioners were supported by Philip Thomas, Sr., the father of deceased.

The evidence does not justify an award on the ground of dependency, as provided in paragraphs a, b, c or d of Section 7 of the Workmen's Compensation Act.

No amount being payable under the above paragraphs, the sum of Four Hundred (\$400.00) Dollars is hereby awarded to be paid into the special fund, of which the State Treasurer is *ex officio* custodian, as provided in Section 7, paragraph e of the Act.

This award is subject to the approval of the Governor of the State of Illinois.

(No. 3792—Claimant awarded \$655.43.)

MAYME PECK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.
Opinion filed January 9, 1945.

CARSON & APPLEMAN, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent,.

WORKMEN'S COMPENSATION ACT—*value of maintenance.* Where a State employee elects to accept maintenance at the institution where he is employed, the predetermined values fixed by the State in lieu of such maintenance, will be accepted as reasonable for the purpose of fixing the rate of compensation, in the absence of clear and convincing proof that the same is wholly inadequate.

SAME—duration of temporary total disability. To sustain an award for temporary total disability the burden is on the claimant to prove by the greater weight of evidence not only that she did not work but that she was not able to work during the entire period for which an award is allowed.

SAME—degree of permanent partial disability. Where it appears that the claimant's wrist has been permanently injured the same constitutes the loss of the use of the arm to the extent indicated within the meaning of the Workmen's Compensation Act.

FISHER, J.

The record of this case consists of the Complaint, Original and Supplemental Reports of the Department of Public Welfare, Transcript of Evidence, Claimant's Abstract of Record, Statement, Brief and Argument of both Claimant and Respondent, and Reply Brief of Claimant.

The facts of the case, which are not in dispute, are that claimant was employed by respondent at the Manteno State Hospital on January 1, 1943, at a salary of \$52.50 per month, plus maintenance valued at \$24.00 per month. That on said date, while in the course of her employment, claimant slipped and fell, and as a result suffered a fracture of her left wrist. That because of

the improper healing of the fracture, claimant suffered a partial total loss of the use of her wrist and hand.

No jurisdictional questions are involved and respondent agrees that "the whole point of contention between claimant and respondent is the amount of compensation to which claimant is entitled."

The questions in controversy, presented for determination here, are :

- A. The value of maintenance.
- B. The duration of temporary total disability.
- C. The degree of permanent partial disability.

We will discuss these questions in their order.

A.

The compensation rate is determined by the salary of the employee, including maintenance; and claimant contends that the value of maintenance of \$24.00 per month as fixed by respondent is much too low and thereby deprives claimant of her just rate of compensation. Claimant presents evidence purporting to show that the value of maintenance as furnished to claimant is "between \$50.00 and \$75.00 per month."

In the operation of many of its institutions, the State furnishes maintenance to its employees at a fixed and predetermined value. If the employee desires to seek maintenance elsewhere, a sum equal to the fixed value of the maintenance is added to the salary paid to such employee. In this case the basic salary was \$52.50 per month, and the value of the maintenance at the institution where claimant was employed was fixed at \$24.00 per month. Claimant elected to accept maintenance at the institution. In the absence of very clear and convincing

proof that the fixed value of maintenance is wholly inadequate, it has been the rule to accept such value to be reasonable, and this value is taken for the purpose of fixing the rate of compensation. The evidence here does not justify a change in this general rule. Claimant's monthly salary, for the purpose of fixing her compensation rate is, therefore, her basic salary of \$52.50 per month plus maintenance allowance of \$24.00 per month, or a total of \$76.50 per month.

B.

Claimant seeks temporary total disability for 64 weeks. Respondent contends that no temporary total disability compensation should be allowed for the reason that the evidence does not disclose a definite period of time that claimant was disabled.

A report of the Department of Public Welfare filed herein shows that the injury to claimant occurred on January 31, 1943, and that she was advised to report for duty on February 7, 1943. She worked from February 7th to February 10th, inclusive. On February 10th, 1943, she complained of difficulty in doing her work and requested a leave of absence. She was instructed to return in a week for further examination, but failed to do so. She was paid her salary to March 12, 1943.

Claimant testified that her arm was in a plaster cast for 7 weeks and that the cast was removed by a Doctor Beck of Oakland, Illinois. She further testified on June 1, 1944, that she was then working two days a week.

"To sustain an award for temporary total disability the burden is on the claimant to prove by the greater weight of evidence not only that she did not work but that she was not able to work during the entire period for which an award is allowed."

Stone Company vs. Industrial Commission, 315 Ill. 431.

"It is a well settled rule that the period of temporary total dis-

ability is the time of healing process during which the employee is totally incapacitated from work by reason of the ailment attending the injury."

Peabody Coal Co. vs. Industrial Commission, 308-133.

There is here no evidence whatever to show when claimant was physically able to return to her previous employment, or to do other kinds of work, or when she actually began the work she is now doing.

The claim for compensation for temporary total disability, therefore, cannot be allowed.

C.

Claimant seeks an award for 65% loss of the use of her left arm. It is admitted that claimant suffered a fracture of her left wrist and, from the evidence, it appears that the fracture failed to heal properly and as a result claimant has sustained a permanent partial loss of the use of her wrist. Dr. C. W. Christie, who examined claimant on April 12, 1943, said claimant had a marked deformity of the left wrist and that "x-ray reveals a fracture of the end of the radius and ulna with an overriding of the fragments and, I believe, a total lack of union. I would estimate that she has about 65% to 75% disability of that wrist."

The x-ray report, made at Mercy Hospital, Urbana, Illinois, by Stephen H. Tage, M. D., Radiologist, states—

"Radiographic examination of the left wrist joint, shows a complete, transverse fracture through the radius, $\frac{3}{4}$ of an inch proximal to the wrist joint. Considerable overriding of the fragments is noted. There is also a complete fracture through the styloid process of the ulna, with some medial displacement. DIAGNOSIS: Fracture, radius and ulna—left."

Respondent contends that Dr. Christie's opinion of the **x-ray** report refers only to a loss of the use of the wrist and made no reference to the arm. That there was

no injury to the shoulder, or elbow, or any part of her arm, other than the wrist. Therefore, argues respondent, considering all the joints of equal importance, a 50% loss of the use of the wrist would result in only 16⅔% loss of the use of the arm. Claimant argues "of what avail is flexion of the shoulder joint if one cannot use the remainder of the arm?" Our Supreme Court, in *Payne vs. Industrial Commission*, 296-333, said:

"The loss of any substantial portion of a leg constitutes the loss of the leg within the meaning of the Compensation Act, and the necessary amputation of the leg 10 inches above the ankle joint will entitle the employee to compensation for loss of the leg."

It is difficult, under the evidence, to determine the degree of disability or loss of use of claimant's left arm and, therefore, upon the request of respondent the claimant was asked to appear for observation in order that this cause might be determined from an observation and examination of both the record and the claimant.

From the appearance of claimant's wrist at this time, and a consideration of all the evidence, it appears to us that a reasonable conclusion would be that claimant has been permanently injured to the extent of 30% of the loss of use of her left arm, and we so find.

(Sec. 8, par. e13) Workmen's Compensation Act provides "for the loss of an arm or the permanent and complete loss of its use 50% of the average weekly wage during 225 weeks." Claimant is, therefore, entitled to compensation for 67½ weeks. Claimant's compensation rate, based on her salary, is \$8183 per week, increased 10% (Sec. 8, par. 1), or a total of \$9.71 per week.

An award is therefore entered in favor of claimant, Mayme Peck, in the sum of \$655.43, all of which is accrued and is payable forthwith.

This award is subject to the approval of the Gov-

error as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3820—Claim denied.)

JAMES CONGLIS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1945.

Rehearing denied April 16, 1945.

NICHOLAS P. CONGLIS, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

DAMAGE TO PRIVATE PROPERTY—limitations—plea of statute of—when must be sustained. Where it appears on face of claim that same was filed more than five years after it accrued, it is forever barred under the provisions of Section 10 of the Court of Claims Act, and the Court is absolutely without jurisdiction to make award and a plea of the Statute of Limitations must be sustained.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint was filed on November 8, 1943, seeking an award in the sum of \$15,000.00 for alleged damages to certain real estate owned by claimant and specifically described as :

Lot twenty-three (23) in Green Bay Heights Subdivision, being a subdivision of part of the Southwest Quarter (SW $\frac{1}{4}$) of the Southeast Quarter (SE $\frac{1}{4}$) of Section nineteen (19), Township forty-five (45) North, Range twelve (12), East of the Third Principal Meridian, situate in Waukegan Township, Lake County, State of Illinois.

The above described real estate is located on the southeast corner of Green Bay Road and Washington Street, in said Lake County, and the complaint alleges that said real estate was vacant and unimproved at the time claimant acquired it.

The complaint alleges that during March, 1939, the Department of Public Highways directed their engineers

and contractors, its agents and employees, to construct or repair Green Bay Road at a point where it intersects with Washington Street, at or near the above described real estate of claimant. That without notifying claimant or any other person in his behalf, the said State Highway Department began and completed certain alterations and repairs at said intersection, and that by so doing, the respondent, through its duly authorized agents and servants, destroyed that portion of the road which was running in front of and adjacent to the northwest line of said lot twenty-three, and closed the branch of said road then running adjacent to said road, and by so doing closed in and obstructed the entire branch of said roads, which had heretofore run in front of the entire line of said lot.

The complaint further alleges that the grade of the east line of said Green Bay Road was raised by said Department from one to ten feet from its natural height; that the south line of Washington Street was closed and the grade of said line was lowered from its natural grade line; the closing of said roads on the front and each side of said lot, and the raising and lowering of Green Bay Road and Washington Street, caused the drainage system of lot twenty-three to be greatly impaired and damaged, and that by reason thereof great quantities of water gathered upon said lot when it rained and caused said lot to flood. And further that by reason of said obstruction, elimination and destruction of that portion of the road running immediately and adjacent to the northwest line of said lot, deprives the claimant of his right of ingress and egress, and that claimant has no other means to go to and from his property unless he would trespass on other property.

The claimant further alleges that claimant, in June, 1940, discovered the changes that had been made by the Department of State Highways and thereupon he immediately took up the matter with said Department at its offices at Elgin, Illinois. That conferences were held by some unnamed agent or servant of the respondent by and through the attorney of claimant, and certain promises are alleged to have been made to claimant's attorney that the respondent would vacate said land and pay certain sums of money to claimant for necessary expenses incurred by said attorney in holding conferences with the agents of the respondent, including a reasonable attorney fee. And that although many requests were made thereafter by claimant or his attorney upon said respondent's agents or servants, that they have failed to comply with said promises, as alleged in said complaint. And that by reason thereof this claimant has been damaged as aforesaid.

The record in this case consists of the complaint, the motion of respondent to dismiss, and the answer of claimant to said motion.

The motion of respondent to dismiss is supported by an affidavit of Earl McK. Guy, Acting Engineer of Claims, Division of Highways, Department of Public Works and Buildings, of the State of Illinois, dated December 4, 1943. This motion to dismiss, filed by the Attorney General, is predicated on Rule 10 of this Court, which provides :

Every claim against the State, cognizable by the Court of Claims, shall be forever barred unless the claim is filed with the Secretary of the Court within Eve years after the claim first accrued, saving to infants, idiots, lunatics, insane persons and persons under disability at the time the claim accrued two years from the time the disability is removed."

The affidavit in support of the motion to dismiss shows that affiant examined the records of the Department of Public Works and Buildings, and that said records show that the plan for and the construction of State Bond Issue Route 42A, Section UR, Lake County, Illinois, is the same highway improvement by which the grade of the east line of Green Bay Road was raised, and the grade of the south line of the intersecting street, known as Washington Street was lowered, and the wye connection between said Green Bay Road and Washington Street was removed and that said plans and construction are the same highway improvement which said claimant alleges damaged lot twenty-three, as described in claimant's complaint.

That on April 4, 1937, the Department of Public Works and Buildings, State of Illinois, let a contract for the construction of said State Bond Issue Route 42A, Section UR, Lake County, Illinois. That the contract for the construction of said road and section was awarded on June 5, 1937, and that the work under the said contract was completed and final inspection thereof was made on November 11, 1937.

It appears, therefore, from the records of the respondent above referred to in said affidavit, that this alleged claim is barred by the Statute of Limitation, as provided in Section 10 of the Court of Claims Law.

Claimant, in his answer to the motion to dismiss, files copies of two letters, one dated December 8, 1938, signed by C. H. Apple, District Engineer, and the other dated June 2, 1944, signed by R. T. Cash, District Engineer. Claimant attempts to construe these letters as a new promise to claimant and a waiver on the part of the respondent to its right to plead the Statute of Limitation. We cannot agree with this contention. These letters were

signed by persons who, under the law, could not create a new liability against the State nor increase or enlarge any existing liability.

Statutes delegating powers to public officers must be strictly construed and all parties interested must look to the Statute for the grant of power. *Diederich vs. Rose, et al*, 228 Ill. 610. Every person is presumed to know the nature and extent of the powers of state officers and therefore cannot be deemed to have been deceived or misled by acts done without legal authority. It is a familiar principal of law that all persons who deal with municipalities and subordinate boards and agencies of the State and National Government must, at their peril, inquire into the powers of the officers or agents of such municipalities, boards or agencies to make the contract contemplated. The acts of such officers can only bind in a manner and to the extent of authorized authority.

These district engineers, upon whom claimant relies for his authority in alleging a new promise, were not authorized, under the law, to execute a binding contract with the claimant. Had they done so they would have acted outside the scope of their authority.

This complaint having been filed more than five years after the cause of action accrued, motion of the Attorney General to dismiss must be sustained. Complaint dismissed.

(No. 3826—Claimant awarded \$954.75.)

LOTTIE TYNER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1945.

KUHNS AND HIGGINS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award justified under.* Where an employee of State sustains accidental injuries arising out of and in the course of her employment, an award may be made for compensation therefor, in accordance with the provisions of the Workmen's Compensation Act, upon compliance by the said employee with the requirements thereof.

ECKERT, J.

On January 11, 1943, claimant, Lottie Tyner, an employee of the Department of Public Welfare of the State of Illinois, while serving as an attendant at the Elgin State Hospital, tripped and fell, suffering a fracture of the left humerus. The accident occurred while claimant was preparing to help a patient clean the emergency room at the hospital. A physician was called; claimant's arm was x-rayed, and claimant was put to bed at the hospital where she remained until January 13, 1943.

Claimant was then taken to the Illinois Research Hospital in Chicago and her arm was put in a cast. She returned to the Elgin State Hospital, where she remained until January 22, 1943. At the suggestion of Dr. Reed, managing director of the hospital, she then returned to Chicago and employed Dr. William R. Cubbins. He reset the arm and applied a second cast. She was hospitalized at St. Luke's Hospital in Chicago from January 22nd until January 26th, 1943. She did not return to work until March 22nd, a month after the cast had been removed.

Claimant is a woman fifty-five years of age, married, with no children under sixteen years of age dependent upon her for support. At the time of the accident, the claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The

accident arose out of and in the course of the employment.

During the year immediately preceding the injury, claimant was employed by the respondent at a salary of \$63.00 per month, plus \$24.00 per month maintenance, or a total of \$87.00 per month. She was totally incapacitated from January 11, 1943, until March 22, 1943, a period of ten weeks. Her rate of compensation is, therefore, \$10.04 per week, plus 10%, or \$11.04, making a total of \$110.40 due her for temporary total disability. Claimant, however, has received on account of temporary total disability the sum of \$169.08, or an over-payment of \$58.68.

Claim is made for a 35% permanent and complete loss of use of claimant's left arm. Claimant, testifying on her own behalf, stated that prior to the accident her left arm was perfectly normal; that since the accident, the extension of her left arm is limited; that it feels as if it were tearing out of the joint when she tries to rotate it, or when she tries to lift anything forward; that she feels a weakness, numbness, and trembling in her left hand; that the arm is painful when she bumps against it, or if she lies on her left side.

Dr. Michael I. Reiffel, of Chicago, testifying on behalf of claimant, stated that upon examination of claimant on January 5, 1944, he found a marked flattening of the deltoid group of muscles of the shoulders, a change of the carry angle of the arm from the shoulder down; He found that extension and abduction and rotation of the arm were restricted, both actively and passively; that rotation of the arm at the shoulder was restricted to approximately ninety degrees of the normal one hundred and twenty degrees; that extension of the arm at the shoulder was restricted to one hundred and sixty-five

degrees of a normal one hundred and eighty degrees; and that abduction was restricted to ninety degrees of a normal one hundred and eighty degrees. He testified that this disability was the result of the fracture of the neck of the humerus with the rotation of the shaft, and is a permanent disability. Subsequent examination by Dr. Reiffel on August 2, 1944, revealed no improvement in claimant's condition.

From the evidence, the court is of the opinion that claimant has suffered a **35%** permanent partial loss of the use of her left arm. Under the provisions of the Workmen's, Compensation Act, for such disability, she is entitled to receive the sum of \$11.04 per week for a period of 78.75 weeks, or \$869.40. This amount must be reduced by \$58.68, the amount which she was overpaid for temporary total disability.

It also appears from the evidence that claimant has paid St. Luke's Hospital for necessary hospital services the sum of **\$44.03**, and has paid Dr. William R. Cubbins for necessary medical services, the sum of \$100.00. She is therefore entitled to reimbursement in the total amount of **\$144.03**. No award, however, can be made for the services of Dr. Michael I. Reiffel, as these services were entirely unauthorized by the respondent.

Award is therefore entered in favor of the claimant in the total sum of **\$954.75**, all of which has accrued and is payable forthwith.

(No. 3828—Claimant awarded \$1,079.00.)

RAYMOND BRUCE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1945.

Rehearing denied. March 14, 1945.

R. W. HARRIS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when *award justified under*. Where an employee of State sustains accidental injuries arising out of and in the course of his employment, an award may be made for compensation therefor, in accordance with the provisions of the Workmen's Compensation Act, upon compliance by the said employee with the requirements thereof.

FISHER, J.

Claimant alleges that while employed as an attendant at the Dixon State Hospital, on June 2, 1943, while in the performance of his duties, he was assaulted by a mentally disturbed patient, causing claimant to suffer numerous scratches and bites about his face, body, right hand and thumb. That as a result of said injuries claimant's right hand and thumb became infected, resulting in the permanent loss of the use of his right hand.

This case consists of Statement of Claim, Departmental Report, Transcript of Evidence, and Statement, Brief and Argument of Claimant and Respondent.

The substantial facts are not denied, and the only question to be determined here is the extent of the injury suffered by the claimant. It is definitely established that claimant has suffered the complete and permanent loss of the use of the thumb on his right hand and that he has suffered considerable impairment to all the fingers of his right hand. Dr. Zoltan Glatter, staff physician at the Dixon State Hospital, testifying as to the injury said, in part:

"Q. How long since you examined Raymond Bruce's hand?

A. I didn't examine the hand for the last several months.

Q. Look at it now and tell me the condition which it is in. The whole hand.

A. He cannot bend the fingers on the hand. There is a marked atrophy of the bone and tissues of the thumb since I have seen

him several months ago. But there is no sign of further infection. He cannot flex the thumb toward the palm.

Q. Will claimant at any time be able to use that thumb?

A. He never will be able to use his thumb much better than right now.

Q. Will the condition of his hand improve by exercise?

A. It may improve to a certain extent, but due to atrophy of the bones, it will take years and years.

Q. In examining his hand, will you describe just how much he can flex these fingers with reference to the palm of his hand?

A. He cannot close entirely the fingers to the palm.

Q. Will you say he can half close his hand?

A. He can close it a little over half way.

Q. Can that hand be used for manual labor?

A. It cannot be used for manual labor.

Q. Can his hand, doctor, be used for office work and in writing or work of that nature.

A. To a certain extent it may be used, but it will be awful slow because he cannot adopt the thumb to the rest of the fingers to hold a pen. * * * He will never be able to do much office work. He can do some."

There is much more testimony as to the condition of the hand, and from all the evidence, it appears that claimant has suffered a complete loss of the use of his thumb and a 50% loss of the use of his first, second, third and fourth fingers. Claimant is, therefore, entitled under the Workmen's Compensation Act, to have and receive from respondent 50% of his salary for 130 weeks.

Claimant's salary at the time of the injury was \$15.10 per week. His rate of compensation is, therefore, \$7.55 per week, to be increased 10% (Sec. 8, Par. L), or \$8.30 per week. 130 weeks at \$8.30 per week amounts to the sum of \$1,079.00.

An award is therefore entered in favor of claimant, Raymond Bruce, in the sum of \$1,079.00, payable as follows :

\$697.20, which is accrued and payable forthwith;

\$381.80, payable \$8.30 per week, commencing January 17, 1945.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees. ,,

OPINION ON PETITION FOR REHEARING

FISHER, J.

At the January, 1945, term of this Court an award was made to claimant in the sum of One Thousand Seventy-nine Dollars (\$1,079.00) under the Workmen's Compensation Act, for personal injuries sustained by claimant in the performance of his duties as an employee of respondent.

Claimant now seeks a rehearing on his claim, and, in a petition filed February 1, 1945, for such rehearing, states that he did not base his claim for compensation under the Workmen's Compensation Act, but on the basis of "equity and good conscience." To support his contention claimant refers to the case of *Charles Simmons vs. State*, 5 C. C. R. 417, *Emily Haslan vs. State*, 6 C. C. R. 62, and *Hines vs. State*, 5 C. C. R. 61.

Sub-paragraph 6 of Section 6 of the Court of Claims Act gives this Court power "to hear and determine the liability of the State for accidental injuries or death suffered in the course of employment by an employee of the State, such determination to be made in accordance with the rules prescribed in the Act commonly called the Workmen's Compensation Act, the Industrial Commission being hereby relieved of any duties relative thereto." Under this section, the award was made to claimant in accordance with the terms and provisions of the Workmen's Compensation Act.

Claimant contends that his claim should be considered under said Section 6, Paragraph 4, which is "to

hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State as a sovereign commonwealth, should, in equity and good conscience, discharge and pay.”

Sub-paragraph 4 of Section 6 has no application here. It is true that for a short time prior to the year 1933 awards were made under paragraph 4, but in a comprehensive and exhaustive review in the case of *Crabtree vs. State*, 7 C. C. R. 207, it was concluded that sub-section 4 “merely defines the jurisdiction of the Court and does not create a new liability against the State, nor increase or enlarge any existing liability * * *.” To this interpretation and conclusion we have consistently adhered.

The petition for rehearing is, therefore, denied.

(No. 3845—Claim denied.)

GEORGE S. WARREN, ET AL., Claimants, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed January 0, 1945.

PETIT, OLIN AND OVERMYER, for claimants.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

LICENSE FEE—paid before due—business sold before date on which license fee due—is voluntary and cannot be recovered. Where claimant paid license fee without compulsion on June 21, 1943, although the same was not yet due, such payment is a voluntary one and no award for a refund of such payment can be made, even though claimant sold his business prior to the commencement of the period for which said license fee was paid.

FISHER, J.

Claimants allege that on June 21, 1943, they filed “application for license for the storage of personal prop-

erty for a compensation" with the Illinois Commerce Commission, together with a certified check in the amount of \$50.00 for the license fee. That on June 28, 1943, they sold their business and subsequently on August 16, 1943, and thereafter, attempted to recover the fee paid. That no recovery has been had for the reason that the fee had been deposited with the State Treasurer. Claimants seek an award for \$50.00, the amount of the fee so paid.

The record of this case consists of the complaint, statement, brief and argument on behalf of claimants and respondent, and motion by respondent to dismiss the complaint for the reason that it does not set forth a cause of action at law or equity.

The complaint sets forth the payment of a license fee required by statute for the operation of certain types of public warehouses as required by the provisions of Sections 122 and 125, Chapter 111 $\frac{2}{3}$, Illinois Revised Statutes 1943.

Claimants do not allege that the payment was made under a mistake of fact, or that any situation existed at the time of payment of which the claimants had no knowledge. The fact that claimants, before July 1, 1943, sold their business and therefore did not require a license effective July 1, 1943, does not entitle them to a refund of the fee paid.

Where a fee or tax is paid voluntarily with full knowledge of all the facts the same cannot be recovered in the absence of a statute authorizing such recovery.

Cooper Kanaley & Co. vs. Gill, 363 Ill. 418.

American Can Co. vs. Gill, 364 Ill. 254.

Wright & Wagner Dairy Co. vs. State, 12 C. C. R. 149.

Where a fee or tax is paid voluntarily there is no legal basis for an award for a refund thereof, and none can be made on the ground of equity and good conscience.

Orchard Theatre Corp. vs. State, 11 C. C. R. 271.

Chicago Cold Storage Warehouse Co. vs. State, 13 C. C. R.,
page 111.

Claimants, in their statement, brief and argument, state that the payment of the said license fee was made because a purported representative of the Illinois Commerce Commission visited claimants before July 1, 1943, and told them that they must pay a license fee to operate a warehouse or become liable to the penalty provided by law. Claimants contend therefore, that payment was compulsory and not voluntary. A taxpayer is presumed to have knowledge of the law providing for the payment of a tax, and where payment is made under a mistake of law, there is no legal basis for a refund.

The question involved in this claim has been passed upon by this Court in the case of *Russell Johnson, assignee of the Bud Shoe Store, Inc., vs. State*, 12 C. C. R. 157. The facts in that case show that the corporation paid a franchise tax to the Secretary of State on May 23, 1940, although the same was not due until July 1, 1940. On June 29, 1940, before the commencement of the period for which said tax was paid, the corporation voluntarily surrendered its charter and was issued a Certificate of Dissolution. It sought a refund, based on the belief that the franchise tax paid to the State on May 23, 1940, was due from it to the respondent for the preceding year instead of the year commencing after date of payment. We held this was a mistake of law and that there is no legal basis for an award for a refund thereof and no award can be made on the grounds of equity and good conscience. To the same effect is the ruling in *Orchard Theatre Corp. vs. State*, 11 C. C. R. 271.

There being no legal basis upon which an award can be made, the motion of respondent to dismiss must be sustained.

Case dismissed.

(No. 3867—Claimant awarded \$800.44.)

ROBERT ROBINSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed January 9, 1945.

LOUIS N. BLUMENTHAL, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where an employee of State sustains accidental injuries arising out of and in the course of her employment, an award may be made for compensation therefor, in accordance with the provisions of the Workmen's Compensation Act, upon compliance by the said employee with the requirements thereof.

SAME—When claim for total disability will be denied. In the absence of proof as to when a claimant was physically able to resume his duties, no award for total disability can be made.

FISHER, J.

This claim was filed July 14, 1944, and the record completed October 30, 1944.

The record consists of the Statement of Claim, Transcript of Evidence, Departmental Report, Stipulation, and Waiver of Statement, Brief and Argument by Claimant and Respondent.

Claimant alleges that on July 19, 1943, he was employed at the Chicago State Hospital by the Department of Public Welfare, State of Illinois, as an attendant; that on said date claimant was injured by reason of an accident arising out of and in the course of his employment; that while in the performance of his duties he slipped and fell, and thereby sustained a colles fracture of his left arm, resulting in permanent injury to the extent of 25% permanent loss of the use of said arm.

Claimant asks for compensation for total temporary disability from July 19, 1943, until February 9, 1944, and compensation for permanent impairment of the loss

of use of his left arm. Claimant received medical care and his salary for the months of July and August of 1943.

The period in which claimant was totally disabled is not clear from the record. The only evidence bearing on this point is the question asked of claimant—

- "8. You were totally unemployed from the time of the accident until when,
A. February 9th."

The Departmental Report states :

"This employee was off duty from July 19th to August 19th because of a duty connected injury for which he was paid \$105.00. He then received a paid vacation from August 19th to September 1st inclusive. A Leave of Absence was granted him from September 2nd to October 4th inclusive. He was then on duty from October 5th to October 9th inclusive and he resigned on October 10th."

From this evidence, it does not appear when claimant was physically able to resume his duties, and in the absence of such proof, no award for claimant's total disability can be made.

Claimant was examined by Dr. George N. Beecher and Dr. Benjamin Cohen, who testified that claimant sustained a colles fracture of the left wrist, which fracture resulted in the loss of the functional use of claimant's left forearm in flexion, supination and rotation to the extent of approximately 25% of said extremity, and that, based upon the various x-rays, examination, treatment and reasonable medical certainty, said disability is permanent.

No jurisdictional question is involved, and claimant is entitled to the benefits of the Workmen's Compensation Act. Section 8, Paragraph E provides for the loss of an arm or the permanent and complete loss of its use, 50% of the average weekly wage during 225 weeks.

Claimant is, therefore, entitled to Compensation for 25% permanent loss of the use of his left arm, or **\$14.23** for $56\frac{1}{4}$ weeks. Claimant's average weekly wage at the time of the injury was **\$24.23**, 50% of which is **\$12.11**, increased $17\frac{1}{2}\%$ (Sec. 8, Par. M), or a total of **\$14.23**. Claimant is entitled to have and receive from respondent compensation for $56\frac{1}{4}$ weeks at **\$14.23** per week, or a total of **\$800.44**.

An award is therefore entered in favor of claimant, Robert Robinson, in the sum of **\$800.44**, all of which is accrued and is payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3440—Claim denied.)

WALTER HUSSMAN, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed March 14, 1945.

SHARL B. BASS AND GREENBERG & SACHS, for claimant.

GEORGE F. BARRETT, Attorney General; **WILLIAM L. MORGAN**, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—claim for permanent partial loss of use of each leg—failure of medical testimony to show loss due to injury—bars award. Where the evidence shows that claimant was afflicted with an osteo-arthritis condition, which existed prior to alleged injury for which compensation is sought, and was further complicated by a fourth degree flat feet, and the medical testimony shows that alleged disability was the result of such previous physical condition and that said condition was not caused or aggravated by alleged accidental injury, no award for compensation is justified.

SAME—burden of proof in claims under—is on claimant. It is incumbent upon claimant to sustain his allegation of permanent disability by a preponderance of the evidence.

FISHER, J.

This claim was filed January 15, 1940, and the record completed February 16, 1945. The record consists of the Complaint, Stipulation of Facts, Order to show cause why claim should not be dismissed for want of prosecution, Stipulation for Continuance, Depositions, Departmental Report of Medical Examination during illness of Claimant, Report of Medical Examination of Claimant filed February 13, 1945, Stipulation that case be assigned on the record as filed, and Waiver of Statement, Brief and Argument by Claimant and Respondent. Claim is for compensation under the Workmen's Compensation Act, for disability sustained by claimant as a result of contracting typhoid fever on or about August 18, 1939, while in the course of and as a result of his employment as an attendant at the Manteno State Hospital.

The record in this case discloses that claimant, while engaged as an attendant at the Manteno State Hospital, became ill with typhoid fever on August 16, 1939, and returned to work on February 8, 1940, in the same capacity and at the same salary. Claimant's salary, prior to his illness, was at the rate of \$56.70 per month, plus maintenance, and he had one child under the age of 16 years. His rate of compensation under the Workmen's Compensation Act, was, therefore, \$10.89 per week. He was totally incapacitated for a period of twenty-five (25) weeks, for which he would be entitled to compensation of **\$272.25**. He was paid during this period of illness the sum of \$335.25, which, under the provisions of the Workmen's Compensation Act, was an overpayment of \$63.10.

Claimant testified that he is suffering some permanent disability as a result of this illness, in that he has difficulty in walking and he suffers impairment in his feet and legs. Dr. Alfred J. Mitchell of 3920 Lake Shore

Drive, Chicago, Illinois, testifying in behalf of claimant, stated that in his opinion claimant has sustained about 10% loss of the use of each leg. In cross examination, Dr. Mitchell testified that he had formed his opinion from the history of the illness which he received from the claimant himself; that if he had not received such history from the claimant he could not have decided that the impairment was the result of typhoid fever ; and further, that claimant's present condition might or could be the result of other diseases.

Filed herein is a report of a medical examination of claimant made by Dr. W. A. Baker, M.D., in which, after a most thorough examination of claimant, Dr. Baker concludes—

“I believe that the pain in the legs and lower lumbar region, which he states is excruciating on walking or moving, is entirely due to the old osteo-arthritis which was demonstrated by x-ray in the lumbar region, and complicated by a fourth degree flat feet. The failing vision was nothing more or less than a mild myopia which developed due to his age. I can see no connection between his alleged symptoms and the attack of typhoid fever which he states he had in 1939.”

It is incumbent upon claimant to sustain his allegation of permanent disability by a preponderance of the evidence. This, he has not done. In fact, the greater weight of the evidence indicates that claimant has sustained no permanent disability. He is now engaged in other employment, for which he receives more compensation than he received as an attendant at the Manteno State Hospital. He has sustained no permanent disability, and he has been overpaid for his temporary disability. The claim for an award must, therefore, be denied.

The claim for an award is denied.

(No. 3441—Claimant awarded \$525.21.)

RUSSELL McDONALD, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 13, 1945.

SHARL B. BASS AND GREENBERG & SACHS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L.
MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Manteno State Hospital within provisions of—contraction of typhoid while so employed—resulting in permanent loss of hearing of the left ear—compensable under.* Where attendant at Manteno State Hospital contracted typhoid fever, while engaged in the performance of his duties at said institution, resulting in total and permanent loss of hearing of the left ear, an award may be made for compensation therefor in accordance with the provisions of the Workmen's Compensation Act, upon compliance by the employee with the requirements thereof.

ECKERT, J.

The claimant, Russell McDonald, contracted typhoid fever on August 19, 1939, while in the employ of the respondent as an attendant at the Manteno State Hospital. He was totally incapacitated until November 1st of the same year, and during the period of his illness he was paid by the respondent the total sum of \$157.30. He now seeks an award for \$103.45 for medical care, \$660.00 for loss of sight, \$412.50 for loss of hearing, and \$937.50 for loss of use of his legs, or a total award of \$2,113.45.

At the time of his illness, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the illness and claim for compensation were made within the time provided by the Act. Claimant had no children under sixteen years of age. It is stipulated that a typhoid fever epidemic existed at Manteno State Hospital from July 10, 1939, to December 10, 1939. The typhoid fever contracted by the claimant was accidental and arose out of

and in the course of his employment at the Manteno State Hospital, and any injury arising therefrom is compensable under the provisions of the Workmen's Compensation Act. *Ade vs. State*, 13 C. C. R. 1.

For the year immediately preceding his illness, claimant's wages were \$903.10, or a weekly wage of \$17.37. His rate of compensation is, therefore, \$8.69 per week, plus ten per cent, or \$9.56. Being totally incapacitated from August 19, 1939, to November 1, 1939, a period of 10-4/7 weeks, he was entitled to \$101.06 for temporary total disability. Claimant, however, received on account of such disability the sum of **\$157.30**, which was an over-payment of \$56.24. This must be deducted from any award in this case.

On August 27, 1941, claimant was examined by Dr. Alfred H. Herman, of Chicago. From the report of Dr. Herman, and from the testimony of the claimant, it appears that claimant has suffered a complete loss of hearing in his left ear. It also appears from the record that claimant has incurred charges for medical services of Dr. Daniel K. Hur in the amount of \$103.45. The record, however, does not sustain the claim for impaired vision, or the claim for loss of use of either of claimant's legs.

The court, therefore, finds that claimant has suffered the total and permanent loss of hearing of the left ear, and is entitled to receive from the respondent 50% of his average weekly wage for a period of fifty weeks, or the sum of \$478.00. He is also entitled to an award for medical expenses in the amount of \$103.45, or a total award of \$581.45. From this must be deducted the over-payment on account of temporary total disability in the amount of \$56.24, leaving a balance of \$525.21.

Award is therefore entered in favor of the claimant in the total sum of \$525.21, of which \$103.45 is to be paid

for the use of Dr. Daniel K. Hur. The entire award has accrued and is payable forthwith.

(No. 3453—Claim denied.)

NUEL GAMBLE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 14, 1945.

SHARL B. BASS AND GREENBERG & SACHS, for claimant.

GEORGE F. BARRETT, Attorney General ; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claim for partial permanent loss of the use of legs and for loss of hearing — lack of evidence to sustain—bars award.* Lack of any evidence to sustain the claim for permanent partial disability bars an award therefor.

FISHER, J.

This claim is for benefits under the Workmen's Compensation Act. Claim was filed February 7, 1940, and the record of the case completed on March 5, 1945. Claimant alleges, and the record shows, that on the 29th day of August, 1939, he was an employee of respondent at the Manteno State Hospital in the capacity of an attendant; that on the said date of August 29, 1939, claimant, in the course of his employment, was taken ill with typhoid fever, from which illness he recovered and returned to his work as an attendant at the Manteno State Hospital on December 10, 1939.

The record consists of the Complaint, Amended Complaint, Stipulation, Order to show cause why claim should not be dismissed for want of prosecution, Stipulation for Continuance, Medical Report made at the time of the illness, Medical Report of an examination made January 11, 1945, and filed herein March 1, 1945, Stipulation with reference to the record, and Waiver of

Statement, Brief **and** Argument by both Claimant and Respondent.

No claim is made for temporary disability for the reason that claimant was paid full salary during the period of his illness.

Claimant seeks permanent disability for partial permanent loss of the use of his legs and 'for loss of hearing. No evidence is presented in this case to sustain the claim for permanent partial disability. The medical examination of claimant made by Dr. Lowenstein at the Manteno State Hospital, a report of which was filed herein on March 1, 1945, discloses no disability, and the report summarizes the examination as 'physical examination is essentially normal.'

There being no proof that claimant has sustained any permanent disability, the claim for compensation must be denied.

Award denied.

(No. 3465—Claimant awarded \$120.00.)

KATHERINE BINDIG, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 14, 1945.

SHARL B. BASS AND GREENBERG & SACHS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—permanent total disability—burden of proof is on claimant—failure to sustain claim for permanent disability bars award. Where the evidence submitted fails to show that claimant has sustained any permanent physical disability compensable under the Workmen's Compensation Act, the claim for such compensation must be denied.

SAME—medical expenses—when compensable. Where the claimant could not obtain necessary medical attention at the Manteno State

Hospital because of the epidemic which existed there at the time and was, therefore, compelled to engage the services of her own doctor, she is entitled to be reimbursed for such expenditures under the Workmen's Compensation Act.

FISHER, J.

This claim is for benefits under the Workmen's Compensation Act. Claim was filed on March 5, 1940, and the record of the case completed on March 5, 1945. The record consists of the Complaint, Stipulation, Order to show cause why claim should not be dismissed for want of prosecution, Stipulation for Continuance, Medical Report at time of illness, Report of recent medical examination, Stipulation with reference to the record, Deposition, and Waiver of Statement, Brief and Argument by both Claimant and Respondent.

The stipulated facts in this case are, that claimant was employed by respondent at the Manteno State Hospital as an attendant; that in the course of her employment, on the 18th day of August, 1939, she became ill with typhoid fever; that upon recovery from her illness she returned to her employment on December 2, 1939, at the same salary she had received prior to her illness; and that she was paid her full salary during the time of her illness.

As full salary was paid during the period of her illness, no claim is made for temporary disability.

Claim is, however, made for permanent disability for partial loss of the use of both legs and for loss of hearing and vision. Claimant submitted to a physical examination on September 23, 1944, by Dr. B. Cohen, Staff Physician at the Manteno State Hospital, a report of which examination was filed herein, on March 1, 1945. This report discloses that claimant's vision, uncorrected, is 20/30 in both eyes, and corrected, is 20/20; that her hear-

ing is good; that the extremities are good; and that there are no disabling defects. Nothing in the report of this examination sustains the claim for permanent disability, and there is nothing in the record that would indicate that claimant has sustained any permanent physical disability compensable under the Workmen's Compensation Act, and the claim for such compensation must therefore be denied.

Claimant testified that due to an epidemic which existed at the time of her illness at the Manteno State Hospital, she was unable to obtain necessary medical attention and was compelled to engage the services of her own doctor, one Daniel K. Hur, M.D., of Manteno, Illinois, who attended claimant for a period of six weeks; that he visited her at least twice a day, or oftener, and that his charge for services was the sum of One Hundred Twenty Dollars (\$120.00), which was paid by claimant. Claimant is entitled, under the Workmen's Compensation Act, to be reimbursed for this expenditure.

An award is therefore entered in favor of claimant, Katherine Bindig, in the sum of One Hundred Twenty Dollars (\$120.00).

(No. 3477—Claim denied.)

RUTH ROBINSON, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 14, 1945.

SHARL B. BASS AND GREENBERG & SACHS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Manteno State Hospital—permanent total disability—burden of proof is on claimant—failure to sustain claim for permanent disability bars award.* To be entitled to an award for permanent disability claimant must show by a

preponderance of the evidence that she is partially or wholly disabled and that the disability is the result of the injury. Failure to make such proof bars an award under the Workmen's Compensation Act.

FISHER, J.

This is a claim for compensation under the Workmen's Compensation Act. Claim was filed on April 2, 1940, and the record of the case completed on February 23, 1945.

Claimant was employed by respondent as an attendant at the Manteno State Hospital, Manteno, Illinois, and while so employed and during the course of and as a result of her employment, contracted typhoid fever on August 14, 1939. She was discharged as cured on September 30, 1939, and returned to work on January 2, 1940. She again became ill on March 7, 1940, and returned to work on April 24, 1940. The cause of this last illness is not disclosed by the record. Claimant was paid her full salary for the period of her illness, and all expenses and medical bills were paid by respondent.

The record in this case consists of the Complaint, Stipulation of Facts, Order to show cause why the case should not be dismissed for want of prosecution entered July 27, 1944, Medical Report at time of claimant's illness, Report of Medical Examination dated September 14, 1944, Depositions, Stipulation that Report of the Medical Examination on September 14, 1944, shall be prima facie evidence as to the condition of claimant at the time of said examination, and Waiver of Statement, Brief and Argument by both Claimant and Respondent.

Claimant seeks complete and permanent disability compensation, including pension, as provided by the Workmen's Compensation Act. Claimant, in support of her claim for permanent disability, testified that her hands and feet became numb at frequent and regular

intervals; that her legs are weak and swell frequently; and that her eyes are bad. Testifying in her behalf, Dr. Alfred J. Mitchell, 3920 Lake Shore Drive, Chicago, repeats the ailments as given to him by the claimant, and that his objective findings were that her temperature was 98.6, her pulse 104, her blood pressure 100/70; that the examination of the legs was negative; and the movement of both upper and lower extremities was normal. Dr. Mitchell further testified that claimant has suffered some disability which could or might have had some causal connection with claimant's illness from typhoid fever.

However, on cross examination, the question was asked of Dr. Mitchell:

- . "Q. Doctor, the condition you described would be possible as the result of a number of diseases, wouldn't it?
- A. Yes, the most likely one would be secondary anemia of high degree, or it could be a deficiency in the amount of adrenal substance from the adrenal glands which could be an early state of an Addison's disease."

The medical examination of September 14, 1944, made by Dr. Robert A. Crawford at Manteno State Hospital, a report of which was filed herein on February 21, 1945, shows claimant to be practically a normal person; the extremities "negative"; and summarizes the examination as "possible pathology in, the right upper lobe of lung. Hypertension."

Upon recovery from her illness, claimant returned to her former position at the Manteno State Hospital, where she continued to work up to and including the present time. To be entitled to an award for permanent disability claimant must show by a preponderance of the evidence that she is partially or wholly disabled and that the disability is a result of the injury. *Mandell vs. State*, 12 C. C. R. 49. Claimant has failed to make such proof, and

there is nothing in the record of this case upon which to base an award for permanent disability. The claim must therefore be denied.

Claim for an award is denied.

(No. 3501—Claimant awarded \$281.18.)

HELEN KLEMICK, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed September 14, 1943.

Supplemental Opinion filed May 18, 1944.

Petition for Rehearing allowed September 12, 1944.

Second Supplemental Opinion filed March 14, 1945.

M. D. MORAHN, for claimant.

GEORGE F. BARRETT, Attorney General; GLEN A. TREVOR AND WILLIAM L. MORGAN, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Manteno Xtate Hospital within provisions of—contraction of typhoid while so employed—when deemed accidental injury arising out of and in the course of employment—compensable under—judicial notice of epidemic.* Where the State in a previous case involving similar facts, stipulated that typhoid fever epidemic did exist at the Manteno State Hospital at the time in question, the court will take judicial notice of the fact.

Where claimant was employed as an attendant at the Manteno State Hospital during a period when a typhoid fever epidemic existed at the institution, and her work required her to care for infected patients, to handle their clothing and otherwise administer to their needs, it is reasonable to conclude that she contracted her illness during the course of and within the scope of her employment.

FISHER, J.

This claim was filed May 18, 1940, and the record of the case completed on June 8, 1943.

The record consists of the complaint, transcript of testimony on behalf of claimant, abstract of evidence, stipulation and statement, brief and argument for claimant and respondent by respective counsel.

Claimant alleges that she was employed as an attendant at the Manteno State Hospital, operated by the Department of Public Welfare, State of Illinois, and that while so employed on or about August 13, 1939, she contracted typhoid fever due to the drinking of contaminated water which was supplied from the wells of the institution; that as a result of this illness, she incurred obligations for medical and hospital services, and that she has become totally and permanently disabled.

Claimant seeks compensation for total permanent disability, and a pension for life as provided by the Workmen's Compensation Act and the payment of medical expenses incurred by reason of her illness.

No jurisdictional questions are involved, and it is conceded that claimant and respondent were operating under and subject to the provisions of the Workmen's Compensation Act.

There is no proof whatever in this record that claimant contracted her illness as a result of drinking contaminated water, and no proof of the source of the infection. There is no proof that the water or food furnished by the institution to employees and inmates was in any manner contaminated, or contained typhoid bacilli. The record shows that claimant became ill with typhoid fever while employed by respondent as an attendant at the Manteno State Hospital, and that she was at that time living at the institution. The determination of this claim on its record alone would necessitate the denial of an award, for the reason that there is no proof that the injury arose out of and during the course of claimant's employment.

However, this court has before it for consideration at this September term, 1943, the case of *Mary Ade, claimant vs. State of Illinois, respondeat*, #3429, in which

case it is stipulated by respondent that a typhoid fever epidemic existed at the Manteno State Hospital, Manteno, Illinois, from July 10, 1939, to December 10, 1939. By reason of this stipulation of record before us, we have knowledge that a typhoid fever epidemic existed at the Manteno State Hospital from July 10, 1939, to December 10, 1939.

Respondent contends that this claim should not be allowed for the reason that there is no proof that the water in the institution was contaminated with typhoid bacilli.

In the case of *Permanent Construction Company vs. Industrial Commission*, 380 Illinois 47, it was held that an injury arises out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resultant injury.

Claimant herein worked as an attendant at the institution during a period of time when a typhoid fever epidemic existed at the institution. Her work required her to care for infected patients; to handle their clothing and otherwise administer to their needs. She contracted typhoid fever. We believe it reasonable to conclude that she contracted her illness during the course of and within the scope of her employment.

The facts herein are similar to the case of Mary Ade #3429 hereinbefore referred to in which case we discussed the law at length, which controls in this case. We conclude that under such facts, a claimant is entitled to the benefits of the Workmen's Compensation Act.

Claimant was unable to receive proper medical attention from respondent at the time of her illness, and it became necessary for her to secure the services of

Doctor Daniel K. Hur. She is therefore entitled to receive from respondent the necessary medical expenses incurred and temporary 'total disability compensation from the date of her illness; August 14, 1939, until November 22, 1940, the date of the hearing herein, except for the month of June, 1940, during which month claimant was employed and for which she has been paid. Claimant's salary 'including maintenance was \$1,044.00 per year or \$20.08 per week. Her compensation rate is 50% of her average weekly wage plus 10% or \$11.04 per week. She is therefore entitled to receive for temporary total disability \$11.04 per week for 61 2/7 weeks or \$676.58.

By stipulation herein it is shown that claimant was paid during her illness to August 1, 1940, the sum of \$675.70, which was for unproductive time, except the month of June during which she worked. Her salary for June of \$63.00 was earned and the balance of \$612.70 was for unproductive time, and must be deducted from the sum which she is entitled to receive as compensation.

Claimant incurred medical expenses in the sum of \$217.30, and is therefore entitled to have and receive from respondent, medical services \$217.30, temporary total disability compensation for 61 2/7 weeks at \$11.04 per week or \$676.58 or a total of \$893.88 less \$612.70 payment for unproductive time, leaving balance due claimant of \$281.18.

Claimant also asks for permanent total disability compensation equal to the amount, which would have been payable in case of death and a pension thereafter as provided in Section 8, paragraph 20 F. of the Workmen's Compensation Act.

The evidence herein does not sustain the allegation that claimant has been totally and permanently disabled. There is much testimony as to her disability; that her

eyesight and hearing have been impaired; that she suffered from a blood clot on her leg; that she is suffering from colitis, myocarditis and nervousness and that she is a typhoid carrier.

Doctor Daniel K. Hur testified that claimant's nervous system was such that she was more or less unstable at the time of his last examination; about November 10, 1940, "which was probably due to the long periods of illness in the hospital." She complained of pains in the joints of the body, but Doctor Hur could not say that this was a result of the typhoid infection. Neither did he say that the colitis and heart condition was a direct result of the typhoid infection. He did say that she is a typhoid carrier, and that this condition would prevent certain kinds of employment, and that "she has to get only a certain kind of a job."

Claimant may be entitled to additional compensation. Her measure of damages is 50 per cent of the difference between what she was earning at the time of the injury, and what she is now able to earn at suitable employment. (Sec. 8, para. D Workmen's Compensation Act.)

For the reason that we believe claimant may be entitled to further compensation, we retain jurisdiction of this claim for the purpose of making such further order as may be shown to be proper.

An award is entered in favor of claimant, Helen Klemick, in the sum of Two Hundred Eighty-one Dollars and Eighteen Cents (\$281.18), all of which has accrued and is payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

SUPPLEMENTAL OPINION

FISHER, J.

This claim was considered at the September, 1943, term of this Court. In our Opinion, filed at that time, we held "that claimant was entitled to the benefits of the Workmen's Compensation Act, and was allowed \$217.30 for medical services and \$676.58 for temporary total disability compensation, a total of \$893.88; less \$612.70 payment for unproductive time, leaving the balance of the award which was made of \$281.18."

We also found "that claimant might be entitled to additional compensation, and that her measure of damages would be 50% of the difference between what she was earning at the time of the injury and what she is now able to earn at suitable employment." (Sec. 8, par. D, Workmen's Compensation Act, and retained jurisdiction of this claim for the purpose of making such further order as could be shown to be proper.

Subsequent thereto, a stipulation was entered into between claimant, Helen Klemick, by her attorney, M. D. Morahn, and respondent, State of Illinois, by George F. Barrett, Attorney General, that the above named claimant might be examined by Dr. William V. Haskins, a licensed physician and surgeon of the State of Illinois, located at LaSalle, Illinois, to ascertain the present physical condition of claimant, for the purpose of having said physician prepare a detailed report, to be presented as evidence in this cause; and, in pursuance thereto, a report as to claimant's condition was filed by the said Dr. William V. Haskins. No evidence was presented other than this report.

The Court is of the opinion that the additional evidence which has been presented, is insufficient to justify a further award.

The claim for total permanent disability, pension for life, and additional compensation is, therefore, hereby denied.

SECOND SUPPLEMENTAL OPINION

FISHER, J.

Claimant seeks an award for permanent total disability compensation equal to the amount which would have been payable in case of death, and a pension thereafter, as provided in the Workmen's Compensation Act.

This claim was first considered at the September, 1943, term of this Court. At that time we concluded that claimant was entitled to compensation, and an award was entered in her favor in the sum of \$893.88 less \$612.70 paid to her for unproductive time. We also found that claimant might be entitled to additional compensation, which could not be granted under the record presented to us at that time. Jurisdiction of the claim was retained for the purpose of allowing claimant to present further evidence in case she desired to do so.

Claimant asked for a rehearing, which was granted, and further evidence was presented upon which the case was reconsidered; and, in a supplemental opinion, we concluded that the additional evidence which had been presented was insufficient to justify a further award. Claimant, thereupon, asked leave to make oral argument; to present further testimony by claimant; and to present additional medical testimony. This request was granted, and the claim now comes before the Court for reconsideration on the additional testimony of claimant and a medical examination made at the Manteno State Hospital by Dr. Eugene Lowenstein on November 13, 1944.

The facts in this case are fully set forth in our original opinion.

claimant, testifying on October 27, 1944, said that she is now living in the Valley Hotel at Spring Valley, Illinois, and, in answer to the question if she were living there by reason of the order of anyone, said "Yes sir, a gentleman from the Board of Health said I was a typhoid carrier and said I was to stay in my home and not to associate with others, and that is why I was confined to my room." She stated further, that she was unable to obtain work because of the stigma of being a typhoid carrier; and further to the question

"Does the State Board of Health prohibit you from working?"
replied

"They have insisted that I can never mingle among society, never to handle food, and that is my line of work, mostly food."

- Q. "Is there something restraining you from getting work and holding it?"
- A. Yes, sir. In the record there is that I cannot even have my clothes sent out where others do, because I am a carrier. Dr. Baer, Managing Officer of the Manteno State Hospital told me that I could never work in the State Hospital there at Manteno again, because I would be a hazard to the patients as well as myself."

From the testimony, it appeared that claimant had been typed a typhoid carrier by the State Health Department, and had signed a Typhoid Carrier Agreement. This Agreement is now a part of the record, having been obtained and introduced into the record by the Court on its own initiative. The Agreement is, in part, as follows:

4/20/40

TYPHOID CARRIER AGREEMENT

"Permission is hereby granted to Helen Veronica Klemick, a typhoid or paratyphoid fever carrier, to mingle with the public at large and to resume her usual occupation as Hospital Employee (NOT A FOOD HANDLER), as long as she complies with the restrictions listed below:

SIGNED A. J. McNEIL,
(Manteno Twp.) Health Department.
DATED May 7, 1940."

The listed restrictions are that she agrees not to handle food for persons other than her immediate family who have been immunized against typhoid fever; to use care in her personal hygiene; that she will submit specimens upon request of the Health Department; and that she will notify the Health Department of any contemplated change of her present address.

There is no restriction on the activities of the claimant or her occupation, except as a food handler. There are many gainful occupations in which claimant might engage if she is otherwise physically able and inclined to do so.

The physical examination made by Dr. Lowenstein, the report of which was filed herein on December 21, 1944, shows claimant to be 5'-3" in height and her weight to be 222 $\frac{3}{4}$ pounds. Her blood pressure is 210/150. It shows her vision to be 20/70, and her hearing to be diminished on one side. She is otherwise normal, except that she is a typhoid carrier.

We feel, from a reconsideration of the entire record and a consideration of the additional evidence submitted, that claimant is not totally and permanently disabled; and that her illness from typhoid fever, or any results therefrom, does not disable her from pursuing some gainful occupation and earning as much as she was able to earn prior to her illness. Her claim for total permanent disability and a pension for life, is, therefore, denied.

Claimant has, however, suffered some disability by reason of her illness, for which she should be compensated. She has, heretofore, been compensated from the date of her illness to November 22, 1940. Giving to claimant the full advantage and benefit of every reasonable doubt, we now find her disability continued to October 27, 1944, and that she is entitled to have and receive

additional temporary total compensation from November **22, 1940**, until October **27, 1944**, beings a period of **205** weeks, at the rate of **\$11.04** per week, and thereafter, nothing.

An award is therefore entered in favor of claimant, Helen Klemick, in the sum of **\$2,263.20**, all of which is accrued and is payable in a lump sum.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees.")

(No. 3543—Claim denied.)

ALLIE STONE, Claimant, vs. **STATE OF ILLINOIS**, Respondent.

Opinion filed March 18, 1945.

SHAPIRO & LAURIDSEN, for claimant.

GEORGE F. BARRETT, Attorney General; **WILLIAM L. MORGAN**, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim will be denied.* Where no evidence is submitted to substantiate claims for financial loss and medical expenses and the medical report fails to disclose that claimant is suffering from any disability or defect of any kind even remotely connected with the attack of typhoid fever suffered while in the employ of the State, an award will be denied.

ECEERT, J.

The claimant, Allie Stone, contracted typhoid fever on August **15, 1939**, while in the employ of the respondent as an attendant at the Manteno State Hospital. Claimant did not thereafter return to work at the institution, and was given a leave of absence as of June **22, 1940**. From August **15, 1939**, to June **22, 1940**, she received wages from respondent in the total sum of **\$647.75**.

At the time of her illness, claimant and respondent were operating under the provisions of the Workmen's

Compensation Act of this State, and notice of the illness and claim for compensation were made within the time provided by the Act. Claimant had no children under sixteen years of age. It is stipulated that a typhoid fever epidemic existed at the Manteno State Hospital from July 10, 1939, to December 10, 1939. The typhoid fever contracted by the claimant was accidental, and arose out of, and in the course of her employment at the Manteno State Hospital, and any injury arising therefrom is compensable under the provisions of the Workmen's Compensation Act. *Ade vs. State*, 13 C. C. R. 1.

Claimant seeks an award for alleged "great financial loss and expense for private nurses, hospital treatments, medicine, physician's bills, loss of time because of inability to work, and other expenses amounting to the sum of \$761.00," itemized as follows:

For nurse hire.....	\$ 56.00
Series of baths.....	150.00
Medicines, travel expense, food, and other expenses.	160.00
Physician and Surgeon bills.	175.00
Loss of work.....	225.00
Total	\$761.00

There is no evidence in the record, however, to substantiate any of these items.

On September 29, 1944, claimant was examined at the Chicago State Hospital by a staff physician, and it is stipulated that the report of this physical examination may be considered prima facie evidence as to her present condition. The report of an examination by Dr. L. S. Barger of Golconda, Illinois, made at the request of the claimant is also a part of the record. From these medical reports, it appears that claimant is suffering from no disability or defect of any kind even remotely connected with the attack of typhoid fever suffered while in the

employ of the respondent at the Manteno State Hospital.
An award is therefore denied; case dismissed.

(No. 3552—Claim denied.)

RUTH LUCAS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 14, 1945.

SHAPIRO & LAURIDSEN, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*total permanent disability—failure to sustain claim bars award.* Where it appears that claimant sustained no permanent disability and did receive compensation for temporary total disability in excess of that provided in the Workmen's Compensation Act, the claim for an award must be denied.

FISHER, J.

This claim was filed November 6, 1940, and the record completed on February 9, 1945. The record consists of the Complaint, Stipulation of Facts, Department Report of Examination on September 1, 1939, Report of Medical Examination on September 29, 1944, Stipulation that case be submitted on record as filed, and Waiver of Statement, Brief and Argument by Claimant and Respondent.

Claimant alleges that she was employed as a stenographer in the office of the Managing Officer of the Manteno State Hospital, and that on August 29, 1939, she became ill with typhoid fever while in the course of her employment. Claimant had no children under 16 years of age at the time of her illness, and her salary was \$882.00 per year.

It is stipulated that claimant became ill on September 1, 1939; that she returned to work in the same capacity and at the same salary on December 1, 1939.

Claimant was examined on October 29, 1944, by Dr. Charles H. Wolohan of Washington, D. C., and this examination discloses no permanent disability as a result of claimant's illness from typhoid fever. Claimant was paid her regular salary during her illness, which amounted to the sum of \$220.50 for the three month period claimant was unable to work.

Under the provisions of the Workmen's Compensation Act, claimant's rate of compensation would be \$8.48 per week, increased by 10% equals \$9.33 per week, and, being incapacitated as a result of her illness for thirteen weeks, she would be entitled to the sum of \$121.26. She was paid the sum of \$220.50, which was an overpayment of \$99.21.

There is no evidence in the record that claimant incurred any expense for medical attention.

It appearing from the record that claimant sustained no permanent disability, and that she has received compensation for temporary total disability in excess of that provided in the Workmen's Compensation Act, the claim for an award must be denied.

The claim for an award is denied.

(No. 3553—Claim denied.)

LA VAWN CAMPBELL FORSHIER, JR., claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1945.

SHAPIRO & LAURIDSEN, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*total permanent disability — failure to sustain claim bars award.* Where it is stipulated that the report of the physical examination of the claimant made by a staff physician,

may be considered prima facie evidence as to claimant's condition and from such report it appears that claimant is not suffering from any disability or defect of any kind, even remotely connected with the attack of typhoid fever suffered while in the employ of the State, an award will be denied.

ECEERT, J.

The claimant, La Vawn Campbell Forshier, Jr., contracted typhoid fever on September 6, 1939, while in the employ of the respondent as an assistant stenographer at the Manteno State Hospital. Claimant did not thereafter return to work at the institution, and resigned as of December 31, 1939. During the period of her absence, from September 6, 1939, to December 31, 1939, she was paid by the respondent the total sum of \$201.25.

At the time of her illness, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the illness and claim for compensation were made within the time provided by the Act. Claimant had no children under sixteen years of age. It is stipulated that a typhoid fever epidemic existed at the Manteno State Hospital from July 10, 1939, to December 10, 1939. The typhoid fever contracted by the claimant was accidental, and arose out of, and in the course of her employment at the Manteno State Hospital, and any injury arising therefrom is compensable under the provisions of the Workmen's Compensation Act. *Ade vs. State*, 13 C. C. R. 1.

Claimant seeks an award for total permanent disability. On September 28, 1944, however, claimant was examined at the Chicago State Hospital, by a staff physician, and it is stipulated that the report of this physical examination may be considered prima facie evidence as to claimant's condition. From such examination, it appears that claimant is suffering from no disability, or defect of any kind, even remotely connected with the

attack of typhoid fever suffered while in the employ of the respondent at the Manteno State Hospital.

An award denied; case dismissed.

(No. 3619—Claim denied.)

OLIVE F. SANFORD, WIDOW AND EXECUTOR OF J. F. SANFORD,
Deceased, SUBSTITUTED FOR J. F. SANFORD, Claimant, *vs.* STATE
OF ILLINOIS, Respondent.

Opinion filed March 13, 1945.

NOAH GULLETT AND S. S. DUHAMEL, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for respondent.

SALARY—LIMITATIONS—*plea of Statute of—when must be sustained.*
Where it appears on face of claim that the same was not filed in court within five years after it first accrued, it is barred by Statute (Section 10 of the Court of Claims Act.)

ECKERT, J.

John F. Sanford was employed by the respondent as a temporary insurance examiner on March 1, 1931. On September 9th of the same year, he was transferred to the position of insurance clerk, on a temporary permit, and on May 11, 1932, took and passed a civil service examination. He was certified as an insurance clerk on October 1, 1932, and on December 7, 1932, was placed on the salary and wages roll of the Division of Insurance at a salary of \$125.00 per month.

On January 31, 1933, Mr. Sanford received notice from Ernest Palmer, Acting Director of Trade and Commerce, and Superintendent of Insurance, advising him that the Department would have no further need for his services after the close of business on Tuesday, January 31st. On February 1, 1933, the Civil Service Commission received a demand from John F. Sanford alleging that

he had been served with an illegal notice suspending him from service, and asking that the Commission order his reinstatement. He also notified the Commission at that time that his removal from the service was for political, racial, or religious causes.

The case was set for hearing before the Commission on June 13, 1933, and notice given to Sanford.' Because of an injury to the president of the Commission, the hearing was postponed from June 13th to June 20, and Sanford was duly notified of the continuance; He failed, however, to appear at the hearing.

On June 23, 1933, the Civil Service Commission notified Mr. Sanford that the matter had come on for hearing on June 20th pursuant to notice; that no appearance at that time had been made by him, or by anyone on his behalf, and that the Commission had dismissed his petition for want of prosecution.

Mr. Sanford did nothing further until April 23, 1937, when he wrote to the Commission alleging that his discharge had been illegal, stating that he had intended to be at the hearing scheduled for June 20, 1933, but that he had been sick and unable to attend. He requested the Commission to order his reinstatement. This was refused on the ground that four years had intervened since Sanford had been in service of the State.

After the lapse of a second period of four years, Sanford filed his complaint in this court on August 5, 1941, seeking damages in the amount of \$9,180.00. The claim is opposed by the respondent on the ground that any cause of action which Sanford might have had is barred by the Statute of Limitations.

Every claim against the State, cognizable by the Court of Claims, is barred unless filed with the Clerk of the Court within five years after the claim first accrues,

except in the case of persons under disability. (Chapter 37, Section 436, Illinois Revised Statutes, 1943.) John F. Sanford was discharged January 31st, 1933, but his complaint was not filed in this court until August 5, 1941. Upon his discharge, Sanford pursued his statutory rights **and** secured a hearing before the Civil Service Commission. He failed, however, to appear at the hearing or to ask for a continuance; he failed to take any further action for nearly four years. His failure to appear and to substantiate his own charges was not the fault of the Commission. Any claim which Sanford had first accrued in January of 1933. Not having been filed in this court within five years thereafter, it is barred by the Statute.

Award denied; case dismissed.

(No. 3797—Claimant awarded \$979.97.)

NELL SPRAGUE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion Pled March 13, 1945.

Rehearing denied May 8, 1946.

FRANK J. BURNS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Kankakee State Hospital—accidental injury sustained—claim for total permanent disability—burden of proof under is on claimant—disfigurement of face—when compensable.* The burden of proof is upon claimant to prove his claim by a preponderance or greater weight of evidence, and awards can only be made for injuries and only such injuries as are proven by competent evidence, of which there are, or have been objective conditions or symptoms proven not within the physical or mental control of the injured employee herself, and unless there are or have been objective conditions or symptoms proven, no award for compensation can be made.

Where evidence discloses claimant has difficulty in closing left eyelid and that her mouth is drawn to one side and that these con-

ditions had not existed prior to the accident these disfigurements of the face are compensable.

CHIEF JUSTICE, DAMRON delivered the opinion of the court:

This complaint was filed on the 14th day of May, 1943, and seeks an award under the Workmen's Compensation Act for injuries sustained by the claimant while employed as an attendant at the Kankakee State Hospital at Kankakee, Illinois.

The record consists of the complaint, departmental report, original transcript of evidence and abstract of same, stipulation with 2 exhibits, statement, brief and argument of claimant, brief and argument of respondent and reply brief of claimant.

The evidence discloses that claimant had been employed as attendant at the Kankakee State Hospital since October 12, 1928. On the 1st day of February, 1943, she was attacked by a patient who clubbed her about her head with a wooden implement. The blow rendered her unconscious. She was discovered by another employee and was thereafter removed for hospitalization and treatment to the Illinois Research Hospital, Chicago, which is also operated by the State of Illinois. She received medical attention from several members of the staff there; she remained seven weeks and then was returned to the State Hospital at Kankakee. Claimant did not return to her work until January 1, 1944.

Claimant testified that she was knocked unconscious and remained so for a week, that two teeth were knocked out and she suffered other injuries of the gums and mouth; that her left ear drum was punctured and permanently injured and partly destroyed, and that she had a total and permanent loss of hearing in her left ear; that her left eye was injured, probably permanently and the

controlling muscles were paralyzed. She further testifies that she had received serious and permanent disfigurements to the hands, head, face and neck and that the entire left side of her face from crown of head downward was permanently injured and paralyzed; that at the time of assault she received a compound basal fracture to the skull and paralysis of the left leg; that her left foot, especially her 'great toe, was injured and required surgical attention; that her tongue is now permanently paralyzed which has resulted in the loss of taste; that there was a bloodclot in her left ear and that paralysis greatly effects her entire left side.

Under Section 8, Par. (16½) of the Act awards can be made only for total and permanent loss of hearing. The testimony does not support an award for total loss of hearing in either ear. While it is true that claimant testifies that she has lost the complete hearing of one ear and partial hearing of the other ear, her testimony is not supported by medical testimony. Dr. K. C. Springer, eye, ear, nose and throat specialist, testified he made an examination of her ears before the injury. She must have had some loss of hearing before the injury or she would not have been examined by this specialist. Dr. Springer testified he examined claimant on the 31st day of March, 1944, and that her left eye tested by him for vision was 20/400 uncorrected, with glasses it was 20/40 ; that the vision in the right eye uncorrected was 20/200, corrected with glasses was 20/25. This Court is unable to determine from the evidence before it what, if any, loss of vision claimant sustained due to her injury for the reason there is no evidence before it concerning the condition of her eye before the injury. The evidence does show that claimant was required to wear glasses before

the accident and had them on at the time she was attacked.

In claims for compensation under the Workmen's Compensation Act the burden of proof is upon claimant to prove his claim by a preponderance or greater weight of the evidence. *Alexander vs. State*, 13 C. C. R. 5; *Bradecich vs. State*, 13 C. C. R. 56; *Pearman vs. State*, 13 C. C. R. 84, and awards can only be made for injuries and only such injuries, as are proven by competent evidence, of which there are, or have been objective conditions or symptoms proven not within the physical or mental control of the injured employee herself, and unless there are or have been such objective conditions or symptoms proven, no award for compensation can be made. *Nichols vs. State*, 10 C. C. R. 80; *Wasson vs. State*, 10 C. C. R. 497; *Peck vs. State*, 10 C. C. R. 56.

Her claim for total loss of hearing of left ear, partial loss of hearing of right ear and serious and permanent injury to head, hand and neck have not been proven. The proof in reference to these claims does not comply with the rule as enunciated in the above cited cases.

There seems to be no question concerning her claim for permanent disfigurement to her face including her left eye lid. The evidence discloses that she has difficulty in closing this lid and oft times has to use her hand to do so; that she has appearance of starting and she did not have this condition before the accident. There is merit to the claim in reference to her mouth being drawn to one side, this too had not existed prior to the accident. These disfigurements are fully proven and are compensable.

From a full consideration of this record we make the following findings; that the claimant and respondent were, on the 1st day of February, 1943, operating under

the provisions of the Workmen's Compensation Act ; that on the date last above mentioned said claimant sustained injuries which arose out of and in the course of the employment; that notice of said accident was given said respondent within the time required under the provisions of Section 24 of said Act.

That the earnings of the claimant during the year next preceding the injury were \$1,044.00 and that the average weekly wage was \$20.07. That claimant at time of injury was fifty-one years of age and had no children under the age of sixteen years dependent upon her for support. That necessary first aid, all medical, surgical and hospital services have been provided by the respondent.

That claimant is entitled to have and receive from said respondent the sum of \$11.04 per week for a period of forty-eight weeks, that being the period of temporary total disability from the day of the injury to January 1, 1944, when claimant returned to her work ; that claimant is entitled to have and receive from respondent the sum of \$11.04 per week for a period of fifty weeks for disfigurement to her mouth, face and left eye lid as provided in Section 8, Pars. (c) and (17) of the Workmen's Compensation Act as amended. The respondent paid to claimant, subsequent to said injury, salary amounting to the sum of \$167.95 for unproductive work, in lieu of temporary total compensation which must be deducted from this award.

We further find that claimant has expended the sum of \$30.00 for tooth replacement, the sum of \$6.00 for lens and \$30.00 for a facial brace for which the respondent is liable.

An award is therefore entered in favor of Nell Sprague, claimant, in the sum of \$979.97; that the sum

of \$695.52 representing sixty-three weeks has accrued to the 17th day of March, 1945, and is payable in a lump sum forthwith, the remainder of said award in the sum of \$284.45 to be paid to this claimant by the respondent in weekly payments at \$11.04 for twenty-five weeks and one week at \$8.45.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3824—Claimant awarded \$206.25.)

ED. HAHNENSTEIN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 18, 1945.

ALVIN A. BURKART, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*When award may be made under.* Where an employee of State sustains accidental injuries arising out of and in the course of her employment, an award may be made for compensation therefor, in accordance with the provisions of the Workmen's Compensation Act, upon compliance by the said employee with the requirements thereof.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint was filed on the 10th day of December, 1943, for benefits under the Workmen's Compensation Act.

The record consists of the complaint, report of the Division of Highways, stipulation, brief, and argument on behalf of respondent and waiver of the claimant to file a statement, brief and argument.

From this record we find that the claimant, Ed

Hahnenstein was first employed by the Public Works and Buildings, Division of Highways on April 7, 1941, as maintenance supervisor and at the time of the alleged injury was earning eighteen hundred and seventy dollars (\$1,870.00) annually as an employee of the respondent.

On the 31st day of March, 1943, the claimant was assisting a fellow employee to close the endgate of a Divisional Highways truck used in connection with their assigned duties and while the two employees were attempting to remove a stone which had become lodged in the mechanism of the endgate the claimant's right ring finger was caught between the endgate and the truck body injuring it.

The claimant was immediately sent to Dr. C. E. Anderson of St. Charles, Illinois, who rendered first aid and instructed the claimant to report to the Delnor Hospital at St. Charles the next morning for surgical and medical treatment and the shaping of a new finger tip. Claimant complied with these orders, reported to said hospital and received surgical and medical treatment. Dr. Anderson, on May 15 reported to the Division of Highways as follows :

"One-half of distal phalanx of right ring finger missing. Dry dressing on March 31. Hospitalized April 1—local—splinters of bone trimmed smooth—skin sutured. No x-rays taken. Patient was discharged May 15, 1943. Permanent disability is half of distal phalanx of right ring finger, is missing."

The record discloses the defendant lost no time from his employment as result of the injury and makes no claim for temporary total disability. The respondent paid Dr. C. E. Anderson for services rendered, the sum of twenty-five dollars (\$25.00) and the Delnor Hospital, St. Charles, Ill., the sum of ten dollars (\$10.00).

The record further discloses that the claimant, at the time he received said injury was sixty years of age and resided on North Lake Street Road, Aurora, Illinois. He was married but had no children under sixteen years of age dependent upon him for support. The respondent had immediate knowledge of the accident and claim for compensation was made within six months of the date of injury, and the complaint herein was filed within one year of the said date of injury as provided in Section 24, of the Workmen's Compensation Act. The claimant having complied with the jurisdictional requirements the only question to be decided by this court is the extent of the injury.

Upon consideration of the record the Court finds:

That on the 31st day of March, **1943**, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this state; that on said date the claimant sustained accidental injuries which arose out of and in the course of his employment; that notice of the accident was given to said respondent and claim for compensation on account thereof was made within the time required by the provisions of said Act; that the earnings of the claimant during the year preceding the accident were \$1,870.00; and his average weekly wage was \$35.96; that claimant at this time of said injury was 60 years of age and had no child dependent upon him for support; that necessary first aid, medical, surgical and hospital services were provided by respondent; that claimant suffered no temporary disability due to said injury and made no claims therefor; that as a result of said accident claimant suffered the loss of one-half of the distal phalange of the third finger of his right hand, which, under Par. (e)-6 of Section 8 of the Com-

pensation Act is considered the loss of one-half of said finger.

We further find that the claimant is entitled to have and receive from the respondent the sum of \$16.50 per week for a period of **12%** weeks for the loss of $\frac{1}{2}$ of the third finger of his right hand amounting to the sum of \$206.25 as provided in Par. 4 of Section 8 of the Compensation Act, all of which accrued and is payable in a lump sum.

An award is therefore entered in favor of the claimant Ed Hahnenstein for the sum of \$206.25.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3842—Claimant awarded \$10.80.)

YOURTEE-ROBERTS SAND CO., Claimant, *vs.* **STATE OF ILLINOIS**,
Respondent.

Opinion filed March 13, 1945.

Claimant, pro se.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation before payment—sufficient unexpended balance in—when award may be made for value of. This court has repeatedly held that where materials or supplies have been properly furnished to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there was sufficient funds remaining therein to pay same.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

The above named claimant is a corporation, main offices are at Chester, Illinois.

On the 9th day of October, 1942, it delivered material consisting of sand for road maintenance, to the State of Illinois, Division of Highways, District #9, Carbondale, Illinois, amounting to the sum of \$10.80.

This account was presented to the Division of Highways at Carbondale, in January, 1944, was not paid, but was returned to the corporation with an explanation that the appropriation from which it was to have been paid had lapsed. The reasonableness of the claim is not questioned by the respondent.

This Court has repeatedly held that where materials or supplies have been properly furnished to the State, and a bill therefor has been submitted within a reasonable time, but the same was not approved and vouchered for payment before the lapse of the appropriation from which it is payable an award for the reasonable value of supplies will be made, where, at the time the expenses were incurred there were sufficient funds remaining unexpended in the appropriation to pay for the same.

Rock Island Sand & Gravel Co. vs. State, 8 C. C. R. 165; *Oak Park Hospital vs. State*, 11 C. C. R. 219.

This case comes within the rule above set forth, an award is therefore entered in favor of claimant for the sum of \$10.80..

(No. 3843 — Claimant awarded \$395.74.)

CHARLES STONE Co., Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 14, 1945.

Claimant, pro se.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation before payment—sufficient unexpended balance in — when award may be made for value of. Where merchandise is sold to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there was sufficient funds remaining therein to pay same.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

This claimant is a corporation, principal office at Chester, Illinois, and has a quarry and plant at Cypress, Illinois.

It asks an award in the sum of \$395.74 for lime stone furnished to the respondent as per invoices attached to the complaint and made a part thereof.

The record discloses that the claimant furnished the State with the following items: 5.84 tons of Cull stone at \$0.65 which is \$3.80; 13.18 tons roadstone at \$1.00 which is \$13.18; 3.13 tons of roadstone at \$1.00 which is \$3.13; 28.36 tons roadstone at \$1.00 which is \$28.36 ; 51.65 tons roadstone at \$2.20 which is \$113.63; 92.16 tons roadstone at \$1.76 which is \$162.20; 17.10 Agstone at \$2.50 which is. \$42.76; 9.6 tons $\frac{3}{8}$ " stone at \$1.30 which is \$12.48; and 16.20 tons culled stone at \$1.00 which is \$16.20.

The report of the Division of Highways acknowledged the receipt of all of the above except 12.6 tons of stone at \$1.76 a ton amounting to \$22.18. The report states that the Division is unable to account for this difference but it does not deny that delivery was made.

The Division also acknowledges the kind of stone, volume, price and points of delivery as shown on inventories, were agreed upon by the parties when the material was ordered by the Division of Highways.

The Division report also shows that during the time this material was being furnished to the State the claimant was in the process of reorganization. When the corporation invoices were presented to the Division for payment in due course in January, 1944, the appropriation from which they were payable had lapsed.

When merchandise is sold to the State on its orders, and received by it and claimant submits a bill in the correct amount within a reasonable time, and due to no fault or neglect on its part, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there was sufficient funds remaining therein to pay same.

An award is therefore made in favor of claimant in the sum of **\$395.74.**

(No. 3860—Claimant awarded \$839.56.)

THE NATIONAL REFINING CO., A CORPORATION, Claimant, *vs.*

STATE OF ILLINOIS, Respondent.

Opinion filed March 14, 1945.

COVEY, COVEY & COVEY, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation before payment—sufficient unexpended balance in—when award may be made for value of. Where merchandise is sold to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, and same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there were sufficient funds remaining therein to pay same.

FISHER, J.

Claimant, a corporation, alleges' that between the dates of March 19, 1941, and May 18, 1943, by and through its agent, Arthur Budde, it sold and delivered to respondent, gasoline, kerosene, motor lubricating oil and grease, as specifically itemized in its complaint and amended complaint, in the value of Eight Hundred Thirty-nine Dollars and Fifty-six Cents (\$839.56).

The record consists of the Complaint, Amended Complaint, Report of the Division of Highways, Stipulation of Facts, and Waiver of Statement, Brief and Argument by both Claimant and Respondent.

The report of the Division of Highways admits that the allegations of the complaint are correct; that the gasoline, kerosene, lubricating oil, grease and other products were purchased by and for the Division of Highways; that the merchandise was received by the Department; and that "The Division of Highways and Division of State Police records, respectively, show that the items listed on claimant's exhibits (schedules) are correct as to date of delivery, quantity, price, and equipment or individual to which they were delivered. The records further show that payment has not been made to claimant for these materials."

The report of the Division of Highways further admits that "appropriations were in existence during the periods the materials were purchased and funds available in these appropriations for payment of claimant's invoices had they been scheduled within the biennium period."

It was held, in the case of *Shell Petroleum Corporation vs. State*, 7 C. C. R. 224, t h a t

"Where the facts are undisputed that the State has received supplies as ordered by it and that such supplies were legally bought by the State and that a bill therefor was not presented before the lapse of

the appropriation out of which such payment could be made, and further that claimant has not permitted an unreasonable length of time to elapse in so failing to present the bill, an award for the amount due will be made by the Court of Claims."

This rule has been consistently followed.

We find the bills for the merchandise sold and delivered, as alleged, had been submitted within a reasonable time, but that the appropriation had lapsed, without any fault or neglect on the part of claimant; and we further find, that at the time the bills were incurred there remained a sufficient unexpended balance in the appropriation to pay for the same; also that the charge for the said merchandise was fair and reasonable.

An award is therefore entered in favor of claimant, The National Refining Company, a corporation, in the sum of Eight Hundred Thirty-nine Dollars and Fifty-six Cents (\$839.56j).

(No. 3872—Claimant awarded \$1,763.29.)

JOHN REHS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1945.

BARRETT, BARRETT, COSTELLO & BARRETT AND W. H. SHANNER, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*police officer in the Department of Public Safety, Division of State Police within provisions of—accidental injury arising out of and in the course of employment compensable under.* Where it appears that while claimant was engaged in the performance of his duties, he sustained a fracture of his ankle as a result of the skidding of his motorcycle and thereby suffered a 50% permanent loss of the use of his right leg—an award may be made for compensation therefor in accordance with the provisions of the Workmen's Compensation Act upon compliance by the employee with the requirements thereof.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

On August 28, 1943, John Rehs, above named claimant, was a Police Officer in the Department of Public Safety, Division of State Police. On that day he was riding his motorcycle out of the LaSalle-Wacker Garage at 221 N. LaSalle Street, Chicago, travelling over a wet pavement. As he left the ramp of said garage the motorcycle skidded going out of control and fell to the pavement, pinioning the claimant's right leg under it. He was immediately removed to St. Luke's Hospital where he was placed under the care of Dr. H. B. Thomas, Professor Emeritus of the Department of Orthopedics, University of Illinois College of Medicine. He remained under the care of this surgeon until the 22nd day of April, 1944. On August 4, 1944, he filed his claim for benefits under the Workmen's Compensation Act.

The claimant's testimony was taken on the 13th day of December, 1944. At that time a stipulation was entered into by and between counsel and made a part of the record, and is as follows:

That John Rehs, the claimant herein, sustained an accidental injury on August 28, 1943, which did arise out of and in the course of his employment by the respondent, State of Illinois;

That on that date the claimant and the respondent were operating under and subject to the terms and provisions of the Workmen's Compensation Act;

That claimant gave notice to the respondent of the occurrence of said accident within thirty days thereafter, and that a claim for compensation was made on account thereof within six months, as is required by the provisions of the Workmen's compensation Act;

That the annual wage of the claimant for one year next preceding the date of said accident was \$2,113.50;

That the medical on account of said accident was furnished by the respondent herein;

That the respondent paid temporary total disability until the claimant returned to work following said injury;

That claimant had three children under the age of sixteen years at the time of the accident;

That all records and files maintained in the regular course of business by any of the departments, commissions, boards or agencies of the respondent and all departmental reports made by any officer thereof relating to any matter or cause pending before the Court shall be prima facie evidence of the facts set forth therein;

That the only question in dispute is whether or not the claimant is entitled to additional compensation for specific loss of use of his right lower extremity by reason of the injuries, and the proofs in this hearing will be limited to that question.

Claimant testified that a cast was placed on his injured limb and remained there for approximately fourteen weeks; that after it was removed he received physiotherapy treatments at Dr. Thomas' office and in November he returned to work in the Department of Public Safety as a clerk at Elgin, Illinois, and in March, 1944, he returned to his regular duties as a Police Officer. He further testified that after he had returned to his regular work as a Police Officer, he had considerable trouble with the injured limb; that sometimes he would wake up with cramps and the muscles of the leg would tighten, this especially when there was a change in the weather; that he suffered considerable pain and swelling persisted; he further testified that the right foot tired easily and that he was compelled to have an arch built up in his right shoe to support the arch; that he experiences pain through the calf of the leg and through the ankle which also involves the whole foot including the toes; that this pain is not constant but is intermittent; that he does not have full functional use of the right foot, that he had prior to the accident and that especially after he does any amount of walking the swelling is very noticeable; that the leg is not nearly as strong now as it was prior to the accident; that the ankle turns easily if he steps on a small object while walking.

Dr. H. B. Thomas, during the course of treatments rendered the claimant, filed a series of reports with the Department during August, September, October, 1943, January, February, March and April, 1944. These reports are made a part of the Departmental report of the Division of State Police and is prima facie evidence under the rules of this Court.

April 22, 1944, Dr. Thomas submitted his final report which said: "x-ray shows a comminuted fracture of the fibula, 9 cm from proximal end. There is a spiral fracture in the lower $\frac{1}{2}$ of the tibia. The fragments of tibia were aligned and held with a screw. He had pain over the fracture site and ankle for which he received physiotherapy. Prognosis good."

Dr. Hal P. Wells was called to testify on behalf of claimant; he testified he examined claimant at his office in Chicago on the 11th day of December, 1944. He made x-ray films which have been introduced in evidence as claimant's exhibit one, which shows a fracture of the fibula and the ankle joint. He testified that the x-ray showed the beginning of arthritic changes at the ankle joint particularly on the articular surface of the astragalus joint, also in the tarsal region of the foot which articulates with the tibia in making the ankle joint; that the arthritis was creating an unevenness of the articular surface of the bone; that there were some definite spurs shown in the anteroposterior view upon the articular surface of the tibia; that in reference to the fibula, the x-ray showed it was united in good axis and does not show any particular disability in itself; he further testified that the fracture was a very severe one and was in very close proximity to the ankle joint; this arthritis accounted for the swelling and pain over the site of the fracture in the ankle joint and the foot about which the claimant had testified; that there were injuries to three very important nerves, two of which pass very close to

the fracture and must have been involved immediately and during the subsequent convalescent period, when the fibrous tissue was formed. He testified this condition is permanent and that it accounts for claimant's inability to do much standing or walking, and causes weakness of the right leg and foot.

In response to a hypothetical question he stated that the 'objective findings about which he had testified, viz., the excessive callus, the permanent swelling, which is fibrosis, the broken-down arch, and the arthritis were all caused by the injury and these conditions are permanent.

Under the stipulation filed in this case we find claimant's annual wage for a year preceding the accident amounted to \$2,113.50, his average weekly wage therefore would be \$40.64. The record further discloses that at the time of the accident claimant was married and had three children under the age of sixteen years dependent upon him for support ; his weekly compensation rate therefore would be \$21.15. Claimant was not able to return to work for the respondent until the 4th day of November, 1943, being 9 $\frac{4}{7}$ weeks, for which he is entitled to temporary total compensation amounting to the sum of \$202.44. However, the record discloses that the respondent paid to the claimant the sum of \$448.40 as salary during that period for unproductive work, which is an over-payment to claimant by respondent, of \$245.96 which must be deducted.

From a careful consideration of all the evidence in this case the Court is of the opinion that claimant has suffered 50% permanent-loss of use of his right leg. Under Section 8, Par. (e)-15 claimant is entitled to \$21.15 for a period of 95 weeks amounting to the sum of \$2,009.25 for 50% permanent partial loss of use of his

right leg, from which must be deducted the sum of \$245.96, leaving the sum of \$1,763.29.

An award is therefore entered in favor of claimant, John Rehs, in the sum of \$1,763.29. Of this amount the sum of \$1,501.65 has accrued to March 14, 1945, and is payable in a lump sum forthwith. The remainder amounting to the sum of \$261.64 to be paid to claimant at the rate of \$21.15 per week for 12 weeks and one final payment of \$7.84.

: This award is subject to the approval and the Governor as provided in Section 3 of "An Act concerning the payment of compensation- awards to State employees."

(No. 3875—Claim denied.)

PAUL W. BROOKSHIER, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 13, 1945.

RALPH ROUSE, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

NEGLIGENCE—claimant while a student at Eastern Illinois State Teachers' College at Charleston, Illinois, at request of instructor assisted in demonstration of a fluoroscope—because of over-exposure claimant received severe burns on back which have not healed—State not liable for. In the conduct of the Eastern Illinois State Teachers' College the State exercises a governmental function; the doctrine of respondeat superior does not apply and the State is not liable for injuries resulting from the malfeasance, misfeasance or negligence of the officers, agents, employees, teachers, or students thereof.

ECKERT, J.

During the month of October, 1940, claimant, Paul W. Brookshier, was a student at Eastern Illinois State Teachers College at Charleston, Illinois. While attend-

ing classes under Dr. Sidney B. Goff, he was asked by Dr. Goff to act as a subject in the demonstration of a fluoroscope. Claimant was over-exposed to the rays of the fluoroscope and received a severe burn on his back which has not healed. Claimant alleges that he is permanently injured, suffers pain, and is handicapped by the injury in any work which he undertakes. He seeks damages in the amount of \$20,000.00.

The respondent has moved to dismiss the complaint, contending that in the operation and maintenance of the Illinois State Teachers College, the State of Illinois is engaged in a governmental function) and while so engaged) is not liable for damages caused by the negligence of its officers, agents) or employees.

Subsequent to the filing of respondent's motion, claimant filed an additional count to his complaint, alleging that at the time of the injury he had paid tuition to the Eastern Illinois State Teachers College for his instruction, and thereby entered into a contractual relationship with the College; that by reason of such contractual relationship, it became the duty of the College not to hurt or injure the claimant; that because of respondent's failure to carry out the terms of its contract not to hurt or injure the claimant, the claimant has been injured to the extent of \$20,000.00. Respondent thereupon renewed its motion to dismiss claimant's complaint.

This court has repeatedly held that the doctrine of respondeat superior does not apply to the State of Illinois in the exercise of a governmental function, and that the State is not liable for injuries resulting from the malfeasance, misfeasance or negligence of its officers, agents, or employees. *Berg vs. State*, 12 C. C. R. 79. The State, in the conduct and maintenance of the Eastern Illinois State Teachers College, exercises a governmental

function, and it is not liable for personal injuries suffered by a student and occasioned by the malfeasance, misfeasance or negligence of 'the-officers, teachers, agents, employees or students thereof. *Stamford vs. Stante*, 12 C. R. 360.

The fact that claimant paid tuition to the Eastern Illinois State Teachers College furnishes no additional support to his claim. A detailed discussion of the distinctions between contractual and tort liability would not aid claimant's position. The court is of the opinion that the claim rests solely upon the alleged negligence of an agent of the respondent, and must therefore be dismissed.

Case dismissed.

(Nos. 3882 and 3883 consolidated— Claims denied.)

JOHN SHIELDS AND ELDON GRUBER, Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1945.

EDWARD J. FLYNN, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SALARY—*when claim for will be denied.* This court has repeatedly held that where an employee of the State receives and accepts regular salary warrants for personal services, such warrants shall be considered full payment for all services rendered between the dates specified in the payroll or other voucher, and no additional sum can be paid such employee.

· ECKERT, J.

The claimants, John Shields and Eldon Gruber, were employed by the respondent on April 1, 1942, as plumbers and steam fitters, and assigned to work at the Illinois State School for the Blind at Jacksonville, Illinois. They allege in their respective complaints that they were entitled to pay at the prevailing rate for such services in

the community of Jacksonville, Illinois; that the prevailing rate was the Union scale of wages of \$1.70 per hour; that they received \$1.25'per hour from April 1, 1942, to July 1, 1942; that they are entitled to the difference between \$1.25 per hour and \$1.70 per hour for the hours worked during that period; that they worked 530 hours each; and that they are each entitled to additional wages in the amount of \$240.00.

Respondent has filed its motion to dismiss on the ground that the complaints do not allege that the claimants performed services for the respondent for which compensation has not been received.

Section 19, Article IV of the State Constitution of 1870, provides as follows :

"The General Assembly shall never grant or authorize extra compensation, fee or allowance to any public officer, agent, servant or contractor, after service has been rendered or a contract made, nor authorize the payment of any claim, or part thereof, hereafter created against the State under any agreement or contract made without express authority of law; and all such unauthorized agreement or contracts shall be null and void; Provided, the General Assembly may make appropriations for expenditures incurred in suppressing insurrection or repelling invasion."

Paragraph 145, Sub-section 3, Chapter 127 of the Illinois Revised Statutes **1943**, provides as follows :

"Amounts paid from appropriations for personal service of any officer or employee of the State, either temporary or regular, shall be considered as full payment for all services rendered between the dates specified in the pay roll or other voucher and no additional sum shall be paid to such officer or employee from any lump sum appropriation, appropriation for extra help or other purpose or any accumulated balances in specific appropriations, which payments would constitute in fact an additional payment for work already performed and for which remuneration had already been made."

The court has repeatedly held that where an employee of the State receives and accepts regular salary warrants for personal services, such warrants shall be

considered full payment for all services rendered between the dates specified in the pay roll, or other voucher, and no additional sum can be paid such employee. *Gholson vs. State*, 12 C. C. R. 26; *Klapman, et al., vs. State*, 13 C. C. R. 139

Respondent's motion is therefore granted; claims dismissed.

(No. 3887—Claimant awarded \$164.00.)

WABASH RAILROAD COMPANY, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed March 13, 1945.

CARLETON S. HADLEY AND L. H. STRASSER, for
claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR
NEBEL, Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation before payment—sufficient unexpended balance in—when award may be made for value of. Where merchandise is sold to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there were sufficient funds remaining therein to pay same.

ECKERT, J.

Claimant is an Ohio corporation, authorized to do business as a common carrier by rail within the State of Illinois. During the month of December, 1942, it transported two cars of bituminous coal, shipped by Silver Creek Coal Company, from Danville, Illinois, to the Chicago State Hospital at Dunning, Illinois. The billing was as follows:

1. Wabash car No. 35772, containing 102,700 pounds of screening coal and forwarded on Wabash Railroad Company's waybill No. 94,

December 24, 1942, rate \$1.60 per ton, total charge \$82.16. 2. Wabash car No. 35234, containing 102,300 pounds of screening coal and forwarded on Wabash Railroad Company's waybill, No. 109, December 28, 1942, rate of \$1.60 per ton, total charge of \$81.84.

The aggregate claim of the Wabash Railroad Company is, therefore, the total of these two items, or \$164.00.

The rates and charges assessed against these shipments are in accordance with tariffs lawfully on file with the Illinois Commerce Commission. The cars were received by the Chicago State Hospital; and although the mine charges on the two cars were paid the freight charges were not.

Claimant has performed duly authorized services for the respondent; it submitted its statement of costs and charges to the respondent within a reasonable time and has not received payment; such non payment is due to no fault on the ~~part~~ of the claimant; when the charge was incurred there remained a sufficient unexpended balance in the appropriation from which payment could have been made. Claimant is therefore entitled to award. *Rock Island Sand and Gravel Company vs. State*, 8 C. C. R. 165; *City of Kankakee vs. State*, 12 C. C. R. 393.

Award is therefore made in favor of the claimant in the sum of \$164.00.

(No. 3893—Claimant awarded \$1,106.60.)

JOSEPH GENTILINI, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed March 13, 1945.

ROBERT J. SPAHR, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*laborer for State Highway Department within provisions of—accidental injury resulting in loss of use of his right hand, arose out of and in the course of employment—com-*

pensable under. Where it appears that while claimant was engaged in the performance of his duties, he sustained injuries to his hand which resulted in the permanent loss of the use thereof, and the evidence showed that prior to the injury, he had already lost the third finger of his right hand by amputation, an award may be made for 75% permanent and complete loss of this hand less the third finger, in accordance with the provisions of the Workmen's Compensation Act.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

Claimant, Joseph Gentilini, seeks an award under a complaint filed on the 8th day of December, **1944**, which alleges that on the 1st day of July, **1944**, while in the performance of his duties as a laborer for the Highway Department, he was riding on a State Highway truck proceeding in a westerly direction on West Park Avenue at the intersection of Skokie Boulevard in the city of Highland Park, Lake County, Illinois, and that as the truck reached the aforesaid intersection a truck belonging to the Bon Ton Beverage Company, Waukesha, Wisconsin, collided with the state truck injuring the right hand of claimant by crushing it and that it became necessary to amputate the index and part of the other fingers of his right hand. As the result of said injury he claims to have lost the entire use of said hand. The complaint further alleges that the respondent paid him temporary total compensation from July **2, 1944**, to September **30, 1944**, in the sum of **\$214.38** at the rate of **\$16.49** per week. That he was immediately sent to Dr. J. H. Lundstrom by the respondent who rendered first aid and later surgical and medical attention all of which was paid by the respondent.

On February **13, 1945**, evidence was taken in this case in Chicago which shows that the material allegations in said complaint are true.

The only question remaining to be decided in this case is the nature and extent of the injury received by claimant.

The record under consideration consists of the complaint, Departmental Report, evidence, claimant's Exhibits 1 and 2, waiver of brief, statement and argument by claimant and waiver of brief, statement and argument of respondent.

Upon examination of the Departmental report we find that the provisions of Section 24 of the Workmen's Compensation Act have been fully complied with by claimant. That at the time of his injury he was seventy-two years of age, had no children under the age of sixteen years dependent upon him for support, that he was first employed by the Division of Highways Department of Works and Buildings on April 27, 1944, as a common laborer at a wage rate of sixty cents an hour and had continued in this classification and at the same rate until the date of his injury. This report also contains reports of Dr. J. H. Lundstrom, the treating physician, dated July 6, 1944; August 4th, 1944, and September 12, 1944. **This** last report is as follows:

"Right hand badly macerated. Index finger almost completely gone. Multiple lacerations of middle finger and little finger. Complete loss of skin and subcutaneous tissue down to tendons, dorsum right hand. Fracture of little finger. Wound dirty and filled with dirt, oil, and rust. Right ring finger was lost in previous accident. Wound thoroughly scrubbed with green soap and water. Amputation of stump of index finger. Anatomical repair of middle and little finger and hand. Sulfathiazole powder and dressing applied. Patient was discharged September 11, 1944. Date able to work; "Undetermined." Permanent disability: "Fifty per cent loss of function entire right hand." Temporary disability when discharged: "Stiffness of right hand."

The report further shows that the respondent paid the following bills for and on behalf of claimant:

Dr. J. H. Lundstrom, Highland Park	\$145.00
Highland Park Hospital Foundation, Highland Park.	48.50
Total	<u>\$193.50</u>

Upon examination of Exhibit 2 being an x-ray film showing two views of claimant's right hand, we find that claimant has lost the first and third fingers completely, the second and the fourth fingers are considerably deformed., The evidence shows, however, that at the time of the injury, claimant had but three fingers and a thumb on his right hand; the third finger, commonly called the ring finger, having been lost by amputation some time before the accident of July 1, 1944.

Claimant seeks an award for complete loss of his right hand totaling \$2,803.30 under the Workmen's Compensation Act.

In support of his claim the claimant introduces a report of Dr. J. H. Lundstrom, the treating physician (Exhibit 1) dated February 13, 1945, which gives an opinion over the objection of the Attorney General, that claimant had only a 25% remaining functional use of the injured hand.

Upon a full consideration of this record this Court finds: That claimant and respondent were operating under the provisions of the Workmen's Compensation Act at the time claimant was injured; that claimant suffered an accident which arose out of and in the course of his employment; that said injuries, resulted in temporary total disability from July 2, 1944, to September 30, 1944, which was paid by the respondent at the rate of \$16.49 a week, totaling \$214.38.

Claimant had, prior to this injury, lost the third finger of his right hand by amputation and loss of this finger is admitted in the evidence.

If claimant had suffered a complete loss or the permanent and complete loss of use of his right hand, under Section 8, Par. (e) of the Act, he would have been entitled to 50% of his average weekly wages during one hundred seventy weeks, provided he had a complete hand at the time of the injury-on July 1, 1944. Under Section 8, Par. (17½), we must deduct twenty-five weeks from any award that is allowed claimant due to the prior loss of the third finger.

The record supports an award of 75% for permanent and complete loss of this hand less the third finger which amounts to one hundred eight and three-fourths weeks, as provided in Section 8, Pars. (e) and (17½) of the Workmen's Compensation Act, as amended.

The stipulation entered into by and between the claimant and respondent at the time of taking evidence, shows that the annual wage of claimant for the period of one year next preceding the date of said accident was \$960.00. His average weekly wages therefore, would be \$18.46. And his compensation rate is \$10.85 weekly.

The record discloses that the respondent paid the claimant from July 2, 1944, to September 30, 1944, being thirteen weeks for temporary total compensation at \$16.49 per week. This is an over payment based on an erroneous compensation rate. The over payment amounts to the sum of \$73.33 which must be deducted from the award.

An award is therefore hereby entered in favor of claimant, Joseph Gentilini, for \$1,106.60 for specific loss of use of his right hand. This award to be paid to claimant at the rate of \$10.85 per week. Of this amount the sum of \$260.40 has accrued to March 17, 1945, which is payable in a lump sum forthwith. The remainder of said award to be paid to claimant at the rate of \$10.85 per

week for seventy-seven weeks and one week at \$10.75.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the, payment of compensation awards to State employees."

(No. 3896—Claim denied.)

LUVIA HINTON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed March 14, 1945.

PHILIP L. TURNER, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation and filing application therefor within time fixed by Section 24 of the Act is a condition precedent to jurisdiction of court.* Where the record discloses that no application for compensation for injury was filed by employee, as required by Section 24 of the Workmen's Compensation Act, the court is without jurisdiction to entertain the claim.

SAME—*Rules of Court — Rule 5 (a).* To comply with rule 5 (a) of the Court of Claims and Section 24 of the Workmen's Compensation Act, it is not necessary to file a formal written claim and it is sufficient for a claimant to notify the employer of an institution to claim compensation for the injury.

FISHER, J.

Claimant alleges that on the 26th day of December, 1943, and for several years prior thereto, she was employed by respondent as an attendant at the Lincoln State School, Lincoln, Illinois, and that on the 26th day of December, 1943, while in the discharge of her duties, she slipped and fell and, as a result of said fall, broke her right arm and suffered other grave injuries to her person.

She immediately reported her injury to the Medical Officer on duty at the said Lincoln State School, and first

aid was administered, but that no attempt was made to examine the injured arm to ascertain the extent of the injury. That on the 28th day of December she employed a physician who x-rayed the injury and placed the arm in a cast; that the fracture did not make a proper union in knitting and, that by reason of the accident, she has sustained a permanent partial loss of the use of her right arm.

Claimant further alleges "that she has not received any compensation on account of said injury; that she has not presented any claim to any State Department or officer thereof, or to any person, corporation or tribunal; and that she has not received any compensation on account of her claim."

The Attorney General has filed a motion to dismiss this complaint for the reason that it does not comply with Section 24 of the Workmen's Compensation Act.

Section 24 of the Workmen's Compensation Act provides that—

"No proceedings for compensation under this Act shall be maintained unless notice of the accident has been given to the employer as soon as practicable, but not later than thirty days after the accident * * * provided, no proceedings for compensation under this Act shall be maintained unless claim for compensation has been made within six months after the accident * * *"

Claimant alleges her injury occurred on or about December 26, 1943, and the complaint herein was filed on December 23, 1944.

The Supreme Court of Illinois has repeatedly held that the requirements of Section 24 of the Workmen's Compensation Act are jurisdictional and unless complied with a claim for compensation cannot be maintained.

"No proceedings for compensation under the Act shall be maintained unless claim for compensation has been made within six months after the accident. The making of a claim for compensation is juris-

dictional and a condition precedent to the right to maintain a proceeding under the Compensation Act.”

Inland Rubber Company vs. Industrial Commission, 309 Ill. 43.

City of Rochelle vs. Industrial Commission, 332 Ill. 386.

Lewis vs. Industrial Commission, 357 Ill. 309.

United Airlines vs. Industrial Commission, 364 Ill. 346.

Claimant is required under Rule 5 (a) of the Court of Claims “to state whether or not a claim has been presented to any State Department or officer thereof, or to any person, corporation or tribunal, and, if so presented, he shall state when, to whom, and what action was taken thereon * * *,”

To comply with this rule of the Court of Claims and Section 24 of the Workmen’s Compensation Act, it is not necessary to file a formal written claim, and it is sufficient for a claimant to notify the employer of an intention to claim compensation for the injury.

Claimant, however, states in her complaint “that she has not presented any claim to any State Department or officer thereof, or to any person, corporation or tribunal.” Claimant, having made no claim for compensation as required under Section 24 of the Workmen’s Compensation Act, we are without jurisdiction to entertain her claim, and must allow the motion to dismiss.

The motion to dismiss the complaint is allowed, and the claim is dismissed.

(No. 3025—Claimant awarded \$1,955.29.)

ELVA JENNINGS PENWELL, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed April 17, 1945.

JOHN W. PREIHS, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*supplement awards — when may be made under Section 8, paragraph (a). of the Act.* When the evidence shows that the claimant remains totally paralyzed from the waist down, the paralysis being of a spastic type, and that her physical condition has not improved, she is entitled to such care as is reasonably required to relieve her of the effects of the injury, under Section 8, paragraph (a) of the Workmen's Compensation Act and an award may be made for medical and nursing expenses.

ECKERT, J.

Claimant was injured on February 2, 1936, in an accident arising out of and in the course of her employment as a Supervisor at the Illinois Soldiers' and Sailors' Children's School at Normal, Illinois. The injury was serious, causing temporary blindness and general paralysis. The facts are fully detailed in the case of *Penwell vs. State*, 11 C. C. R. 365, in which an award was made to the claimant of \$5,500.00 for total permanent disability, \$8,215.95 for necessary medical, surgical, and hospital services expended or incurred to and including October 22, 1940, and an annual pension of \$660.00. On February 10, 1942, a further award was made to claimant for medical and hospital expenses incurred from October 22, 1940, to January 1, 1942. On March 10, 1943, a further award was made to claimant for medical and hospital expenses from January 1, 1942, to December 31, 1942. On March 15, 1944, a further award was made to claimant for medical and hospital expenses from January 1, 1943, to and including September 30, 1943, in the amount of \$853.07. Claim is now made for an additional award of \$2,020.53 for medical and nursing expenses from October 1, 1943, to and including February 28, 1945.

Claimant remains totally paralyzed from the waist down, the paralysis being of a spastic type; her physical condition has not improved. She has no control over her lower limbs, nor over urine and faeces. From October 1, 1943, to and including February 28, 1945, she has been

required, to relieve her of her injury, and to prevent deformity and to stimulate circulation, and for relief of bed sores, to employ and receive medical services and nursing attention. During that period she has moved from her home in the Village of Beecher City, a small rural village in Shelby County, Illinois, to Kirksville, Missouri, where medical services are available and obtainable at a reasonable cost. She remains helpless, requiring the services of nurses or attendants to move her to and from her bed, to change her bed clothing at least three or four times a day, to administer light treatment to the affected parts of her paralyzed body, and to rub her body with ointments prescribed by her physician. Because of the complete paralysis of her lower abdomen and legs, the functioning of her kidneys and bladder is impaired, and medical attention is required to flush these organs and to prevent infection arising from her impaired circulation and paralysis. The services of a physician are needed almost daily and must be rendered in her home.

Claimant has therefore employed a physician on a monthly basis at a charge of \$75.00 per month, which is a lesser rate than ordinarily charged. During period in question, claimant expended on account of nursing services \$733.00; for drugs and supplies \$187.53; and for medical services \$1,100.00, totalling \$2,020.53. She has submitted to the court, with her verified petition, the original receipts and vouchers showing payment of these respective items.

This court has heretofore held that under Section 8, paragraph (a) of the Workmen's Compensation Act, claimant is entitled to such care as is reasonably required to relieve her of the effects of the injury. (*Penwell vs. State*, supra.) There has been no change in claimant's

physical condition to justify the denial of an award at this time. The award, however, must be confined to such items as are reasonably required. The wheel chair and repairs to wheel chair and lumber for a ramp, as listed in claimant's itemized statement, do not appear to have been so required. The other services claimed appear to have been reasonably required and the charges to be reasonable and just.

An award is denied as to the following items:

Oct. 31, 1943	Wheel-chair repairs	\$16.63
Nov. 20, 1943	W. D. Cornell, wheel-chair..	40.36
Dec. 10, 1943	Lumber to make ramp..	6.00
May 1944	Truitt Service, wheel-chair repair..	1.25
Oct. 25, 1944	R. O. Cleveland, chair repair..	1.00
Total		<u>\$65.24</u>

Award is, therefore, made to the claimant for medical and nursing expenses from October 1, 1943, to and including February 28, 1945, in the sum of \$1,955.29, which has accrued and is payable forthwith. The court reserves for future determination claimant's need for further medical, surgical and hospital services.

(No. 3602—Claimant awarded \$64.69)

THOMAS CRYDER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 16, 1945.

D. D. GOODELL, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

. WORKMEN'S COMPENSATION ACT—*right to receive compensation under—when extinguished.* Under Section 21 of the Workmen's Compensation Act any right to receive compensation shall be extinguished by the death of the person entitled thereto, except in certain specific instances. The award to claimant does not come within the exceptions of Section 21 and the administratrix of the estate of the claimant is

entitled to have and receive only the amount of compensation accrued and unpaid on the date of the death of the claimant and nothing further.

FISHER, J.

An award was entered in favor of Thomas Cryder, claimant in the above-entitled case, on November 10, 1942 (*Thomas Cryder vs. State*, 12 C. C. R. 291).

The case now comes before the Court, on a motion in the nature of a petition, stating that the said Thomas Cryder died on November 15, 1944, and requesting that the unpaid balance of the award be ordered paid to Lucy Cryder as Administratrix of the Estate of Thomas Cryder, or as the sole dependent of Thomas Cryder, deceased.

The Workmen's Compensation Act provides that any right to receive compensation shall be extinguished by the death of the person entitled thereto, except in certain specific instances. Section 21 of the Workmen's Compensation Act reads, in part, as follows:

"* * * Any right to receive compensation hereunder shall be extinguished by the death of the person or persons entitled thereto, subject to the provisions of this Act relative to compensation for death received in the course of employment, and subject to the provisions of paragraph (e) of Section 8 of this Act relative to specific loss; Provided, that upon the death of a beneficiary, who is receiving compensation provided for in Section 7, leaving surviving a parent, sister or brother of the deceased employee, at the time of his death dependent upon him for support, who were receiving from such beneficiary a contribution to support, then that proportion of the compensation of the beneficiary which would have been paid but for the death of the beneficiary. * * *

The award to Thomas Cryder was for disability as provided in paragraph (f), Section 8 of the Workmen's Compensation Act. The award to Thomas Cryder does not come within the exceptions of Section 21, and the amount of the said award unpaid and not due at the-date of his death is, therefore, extinguished.

The Supreme Court of Illinois, in passing upon said provision of Section 21, extinguishing the right to compensation, said in the case of *Central Illinois Light Co. vs. Industrial Commission*, 359 Ill. 430 :

“Provision is made to cover cases where the beneficiary dies whose award was made under Section 7—the death section. The award under review was made under Section 8. The language of Section 21 plainly says that any right to compensation shall be extinguished **by** the death of the person entitled thereto. This award was in favor of Willedge himself, and his death extinguished all payments that fell due after those accrued during the first 83 and three-sevenths weeks, and for these alone the administrator can recover.”

It appears that warrants in the amount of \$312.70 were received and cashed by Thomas Cryder during his lifetime, and a further warrant in the sum of \$58.05 was issued but not cashed, and is still outstanding. In addition thereto, an amount of \$6.64 had accrued and remained unpaid at the time of the death of the said Thomas Cryder.

Lucy Cryder, as the Administratrix of the Estate of Thomas Cryder, deceased, is entitled to have and receive from respondent the amount of compensation accrued and unpaid to Thomas Cryder on the date of his death, November 15, 1944, and nothing further.

An award is accordingly entered in favor of Lucy Cryder, as Administratrix of the Estate of Thomas Cryder; deceased, in the sum of Sixty-four and 69/100 Dollars (\$64.69), payable upon the surrender for cancellation of uncashed warrant issued by respondent to Thomas Cryder in the sum of \$58.05.

(No. 3832—Claimant awarded \$494.00.)

BERTHA ROGERS, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed April 17, 1945.

GUY M. BLAKE, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

CIVIL SERVICE—when discharge illegal — award may be made. Where it appears that claimant was certified by the Illinois Civil Service Commission to a position at the Chicago State Hospital and was at all times ready, willing and able to perform the duties of her position and tendered her performance, her discharge during the period of probation without the prior consent of the Civil Service Commission was illegal and she is entitled to payment of her salary from the date of the wrongful discharge to the time she was reinstated.

ECKERT, J.

The claimant, Bertha Rogers, was certified by the Illinois Civil Service Commission to a position at the Chicago State Hospital on October 2, 1942; she began work at the hospital on October 16, 1942; and she was discharged on November 30, 1942. The discharge was during claimant's period of probation, and was without the prior consent of the Civil Service Commission. It was rescinded on June 10, 1943, and claimant returned to work at the Chicago State Hospital on June 12, 1943. Her salary was \$60.00 per month, plus an allowance of \$18.00 per month for maintenance. She seeks an award in the amount of \$494.00, as follows :

Salary, December 1, 1942, to June 10, 1943, at \$60.00 per month	\$380.00
Maintenance allowance, December 1, 1942, to June 10, 1943, at \$18.00 per month.....	114.00
	<hr/>
	\$494.00

Claimant's discharge during her probationary period was an illegal discharge, and she was wrongfully prevented from performing the duties of the position to

which she had been certified. She was diligent in the protection of her own rights, and at all times for which she seeks payment of salary, she was ready, willing, and able to perform the duties of her position, tendered performance thereof, and such tender was refused. Claimant is therefore entitled to payment of her salary from December 1, 1942, to June 10, 1943. (*Wilson vs. State*, 12 C. C. R. 413.)

An award is therefore entered in favor of the claimant in the amount of \$494.00.

(No. 3879—Claim denied.)

FARM BUREAU OIL CO., INC., Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed April 17, 1945.

JOHN S. GRIMES and ALFRED A. KILTZ, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

COURTS OF GENERAL JURISDICTION—*remedy in—failure of claimant to avail self of—bars award.* Where it appears that an adequate remedy exists in the courts of general jurisdiction, the Court of Claims has no jurisdiction to pass on the claim—for the reason that the Court of Claims was created to provide a remedy where no other adequate remedy existed.

TAX—OIL PRODUCTION ACT—*subsequent invalidation of Act by Supreme Court decision—effect on voluntary payment of taxes thereunder.* Where it appears that claimant paid a tax voluntarily and with a full knowledge of all the facts, the same cannot be recovered in the absence of a statute to the contrary, even though a tax may be illegal or unconstitutional.

FISHER, J.

Claimant filed its claim September 18, 1944, alleging therein that it is an Indiana corporation, and qualified, operating and doing business in the State of Illinois, and that the claimant corporation is a duly organized Pipe

Line Company engaged in the business of purchasing and gathering crude petroleum and has been so engaged since the year **1941**; that, in compliance with the terms of an Act of the State of Illinois commonly known as the Oil Production Act, it deducted **3%** of the value of all oil it gathered from production in the State of Illinois after June 30, 1941, and, that after deducting the **2%** handling charge allowed to the claimant for making such collection and remittance, the claimant remitted the tax so collected to the State of Illinois. Claimant further alleges that the said Oil Production Act has been declared invalid by the Supreme Court of Illinois, and that claimant has remitted and paid to the State of Illinois, under and in compliance with the said Oil Production Act, the sum of \$19,020.40.

Claimant asserts that by reason of the said Act being invalid there is due it from the State of Illinois the sum of \$19,020.40 for tax money remitted by claimant to the Treasurer of the State of Illinois under said invalid Act.

The Attorney General, on behalf of respondent, presents a motion to dismiss the complaint, and, as the reason for said motion to dismiss, contends that:

- (a) A sufficient cause of action at law or in equity is not stated.
- (b) The claimant had an adequate remedy in the courts of general jurisdiction.
- (c) Claim is based solely upon a tax voluntarily paid with a full knowledge of all the facts and the same cannot be recovered.

It is a well settled principle of law in this State that where a tax is paid voluntarily with a full knowledge of all the facts, it cannot be recovered in the absence of a statute to the contrary, even though a tax may be illegal or unconstitutional. Among a number of cases applying this principle is the case of *City of Oglesby vs. State*, 10 C. C. R. **694**. It was also concluded in this case, after a full review, that where a full and complete statutory

remedy exists, such remedy shall be exhausted before recourse is had to the Court of Claims. The claimant herein had a complete remedy under the statutes of this State to protect its interests, which rights it failed to exercise. Having so failed to exercise its rights, it cannot contend that the tax was paid involuntarily. We have consistently held, that where an adequate remedy exists in the courts of general jurisdiction the Court of Claims has no jurisdiction to pass upon the claim. Among the many cases so holding are:

Central States Distributors, Inc., etc. vs. State, 11 C. C. R. 417.

Baum Packing Co. vs. State, 11 C. C. R. 610.

Knowlton Co. vs. State, 11 C. C. R. 617.

Madra Wineries & Distilleries, et al vs. State, 11 C. C. R. 632.

Equitable Life Inc. Co. vs. State, 12 C. C. R. 200.

U. S. Industrial Alcohol Co. vs. State, 12 C. C. R. 326.

Claimant herein could have secured a refund of the taxes paid under the unconstitutional statute if it had followed the provisions of Chapter 127, Paragraph 172, Illinois Revised Statutes 1943 (State Bar Association Edition). By failing to avail itself of the statutory remedy, the claimant corporation has become barred from securing an award in this claim, for the reason that an adequate remedy existed in the courts of general jurisdiction.

Claimant has failed to pursue its statutory remedy, and, as the payment is based upon a set of facts and circumstances which this Court has held many times to be an inadequate basis for an award, the motion to dismiss must be allowed.

Claim dismissed.

(No. 3889—Claim denied.)

FRANCIS HALLISEY, Claimant, *vs.* STATE OF ILLINOIS, Respondent,
Opinion filed April 17, 1945.

T. V. HOULIHAN, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

NEGLIGENCE—*employees of Department of Highway Maintenance in using poison spray along highway for the purpose of killing weeds—three cows died and two permanently disabled from eating grass alleged to be so poisoned—State not liable for—award for damages on grounds of equity and good conscience cannot be made.* In the construction and maintenance of the public highway system the State is engaged in the exercise of a governmental function, and it is not liable for the acts of its officers, agents or employees in the performance of such governmental function.

SAME—*Court of Claims Act—paragraph 4, Section G—to hear and determine all claims—which the state, as a sovereign commonwealth, should in equity and good conscience discharge and pay.* It is well settled that the rule or doctrine of respondeat superior is not applicable to the State. The above paragraph of the Court of Claims Act merely defines the jurisdiction of the Court. Before a claimant can have an award against the State, he must show that he comes within the provision of some law making the State liable to him for the amount claimed. If he cannot point out any law giving him the right to an award, he cannot invoke the principle of equity to secure the award.

FISHER, J.

Francis Hallisey, in his complaint filed herein on November 15, 1944, alleges, in substance, as follows:

That on or about the first week in October, 1944, the Department of Highway Maintenance, State of Illinois, with headquarters at Elgin, Illinois, sprayed poison along the highway for the purpose of killing weeds along the highway;

That a portion of the road-side so sprayed lies along and adjoining land of claimant in Hebron Township, McHenry County, Illinois;

That this poison was so sprayed as to fall upon adjoining land and upon the grass and crops belonging to claimant;

That thereafter five dairy cows belonging to claimant, as a result of eating the grass so poisoned, became sick, and three died and two became permanently disabled and of no further value;

That claimant was thereby damaged in the sum of \$963.00, for which sum he seeks an award.

That Attorney General filed a motion to dismiss the complaint for the reason that "the damages alleged to have been sustained by the claimant are based upon the acts of the employees of the respondent while engaged in a governmental function, and no liability rests upon the State for damages caused by such acts."

The record of the case consists of the Complaint, Motion to Dismiss, Statement, Brief and Argument on behalf of Respondent in support of the said Motion, and Reply Brief and Argument on behalf of Complaint.

The State of Illinois, as a part of the public highway system, constructs and maintains hard surfaced roads and various other highway improvements. In such construction and maintenance the State is engaged in a governmental function.

Allison vs. State, 11 C: C. R. 420.

Reaber, etc. vs. State, 12 C. C. R. 99.

Turner, etc. vs. State, 12 C. C. R. 265.

In the spraying of poison along the highway for the purpose of killing weeds, as alleged by the claimant, the agents or employees of the State were performing acts in connection with maintaining the said highway and were engaged in a governmental function. In the performance of such governmental function the State is not liable for the acts of its officers, agents or employees.

Morrissey vs. State, 2 C. C. R. 254.

Reaber, etc. vs. State, 12 C. C. R. 99.

Turner, etc. vs. State, 12 C. C. R. 265.

Hewlett vs. State, 13 C. C. R. 27.

Minear vs. State Board of Agriculture, 259 Ill. 549.

A claim quite similar was considered by this Court in the case of *Herbert E. Cleveland vs. State*, 8 C. C. R

346, in which case it was claimed that chemicals sprayed along the highway for the purpose of eradication of Canada Thistles fell within the field of the claimant adjoining the highway, and a number of cattle died as a result of eating grass that had been sprayed with the said chemicals. The Court held that there was no doubt that the claimant had suffered a substantial loss "but in the absence of some law creating a legal liability against the State, this Court believes itself without jurisdiction to make an award."

In the case of *Kinnars vs. City of Chicago*, 171 Ill. 332, the Supreme Court of this State said "When the State acts in its sovereign capacity it does not submit its actions to the judgment of the courts, and is not liable for the torts or negligence of its agents."

Counsel for claimant contends that the damages to the claimant were caused by the acts of the agents of the State in the performance of their duties and that the claimant should be compensated for his loss, and says that unless the State is responsible claimant has suffered a severe loss at the hands of the employees of the State, and yet is deprived of any right of compensation. Counsel further argues, with considerable force, that if the position of the Attorney General is correct, it leaves the claimant at the mercy of the State to use new, unusual and novel ways for the eradication of weeds on the highway without giving the adjoining property owners any protection for loss that may result therefrom. Claimant contends that this Court has full power to make an award in this claim under paragraph 4, Section 6 of the Court of Claims Act. Section 6 of the Court of Claims Act defines the powers and duties of the Court and is, in part, as follows:

6. The Court of Claims shall have power:

Par. 1 To make rules and orders not inconsistent with law, for carrying out the duties *imposed upon it by law*.

Par. 4 To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should, in equity and good conscience discharge and **pay**.

Claimant asserts that under the cases above cited the words of said paragraph 4 are given no meaning whatsoever. In construing this paragraph (4) it must be remembered that it is the well settled law of this State that the rule or doctrine of respondeat superior is not applicable to the State, and it nowhere appears that it was the intention of the Legislature to go so far as to change this law and to make the State liable for the acts of its agents and employees.

The full meaning of paragraph 4 of Section 6, after much study, was discussed at great length in the case of *Crabtree vs. State*, 7 C. C. R. 207, in which case it was concluded that this section "merely defines the jurisdiction of the Court and does not create a new liability against the State nor increase or enlarge any existing liability and limits jurisdiction of the Court to claims under which the State would be liable in law or equity, if it were suable, and where claimant fails to bring himself within the provisions of a law giving him the right to an award, he cannot invoke the principles of equity and good conscience to secure one."

In the case of *Peterson. vs. State*, 6 C. C. R. 77, this Court said:

"It is plain from the language of this statute (The Court of Claims Act) that no claim against the State can be allowed by this Court unless there is either a legal or equitable obligation of the State to **pay** it. Before a claimant can have an award against the State, he must show that he comes within the provisions of some law making the

State liable to him for the amount claimed. If he cannot point out **any** law giving him the right to an award, he cannot invoke the principle of equity to secure the award. Where there is no legal liability, equity cannot create one. (10 R. C. L. Sec. 132.) Equity is not the court's *sense* of moral right; it is not the power of the court to decide a case according to the high standard **of** abstract right, regardless of the law. * * * To give this statute the construction contended for by claimant would result in giving this court the power to hold the State liable for the misfeasance and malfeasance of all its officers, the torts of all its servants and agents, and all damages caused by the wrongful exercise of their powers by such officers and agents. We do not believe the Legislature intended any such radical and far-reaching change in the law when it enacted the statute creating this Court."

In the case of *Perry vs. State*, 6 C. C. R. 81, this Court said:

"Claimant urges, however, that he should be awarded compensation as an act of justice and equity regardless of the principles **of** law involved. The jurisdiction of this Court is fixed by law and it has no powers except those given by the Act creating it. Section Six (6) of that Act provides: "The Court of Claims shall have power to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should in equity and good conscience discharge and pay." It is obvious from the language of this statute that no claim against the State can be allowed by this Court unless there is either a legal or equitable obligation **of** the State to pay it. If there is either a legal or equitable obligation resting upon the State to pay a claim, then justice requires that the State should pay it. * * *

"Claimant's idea seems to be that equity is used in this statute **as** nothing more or less than the power of the court to decide each case according to a high standard **of** morality and abstract right, regardless of the law, such a construction would leave this Court with practically no limitation upon its power to render judgments against the State. * * *

When the Legislature created this Court and clothed it with power to hear claims against the State we do not think it thereby intended to waive the right **of** the State to interpose any legal or equitable defense it might have to the demands of claimants. * * *

This interpretation of paragraph 4 of Section 6 of the Court of Claims Act we think to be sound, and since the *Perry* case, and the *Crabtree* case, *supra*, it has been persistently and strictly adhered to by this Court: Much as we might like to interpret this section so as to enable us to grant an award in cases such as the case under con-

sideration, we do not feel that we can go beyond the plain interpretation of the law as it is written, and that it is not our function to attempt to, in effect, legislate by interpretation. Assuming the facts set forth in this complaint to be true, there is no question but that claimant has suffered a material damage, and we regret that we have no authority, under the law, to compensate him for such damages.

The Legislature of this State has long been aware of this limitation and, in an attempt to broaden the authority and jurisdiction to the Court of Claims to consider cases of this kind, the 58th General Assembly passed an Act to amend Section 6 of the Court of Claims Act, which amendment was vetoed by the then Governor, the Honorable Henry Horner, who said in part:

* * * "As phrased, the amended portion of the section seems to make the State liable for all instances where a private person or private corporation would be liable, to exempt the State from liability under the doctrine of respondeat superior and to make the State liable for the wilful and wanton act or negligence of an employee of the State. Inasmuch as the doctrine of respondeat superior holds a master responsible for negligent acts of an employee committed while he is acting within the general scope of his employment, it could be seen readily that the provisions are directly contradictory and impossible of interpretation. * * * (Veto Messages of Governor Horner on Senate and House Bills passed by the 58th and 59th General Assemblies of Illinois, page 104.)

Again, the 59th General Assembly, amended paragraph 4 of the Court of Claims Act, to read:

"To hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, which the State, as a sovereign commonwealth, should discharge and pay; to hear and determine all claims and demands, legal and equitable, liquidated and unliquidated, ex contractu and ex delicto, in respect to which the claimant would be entitled to redress against the State if the State were suable. Where any person has suffered damage as a result of the performance by the State of any of its governmental functions, the doctrine of respondeat superior shall not apply; provided, however, that the court shall have the power to hear claims in cases now

pending or hereafter brought in said court to recover damages from the state for the death or injury of any person, or for the injury to or destruction of property, caused by the wilful and wanton act or conduct, or the negligence of an employee of the State while acting in the course of his employment, where there is no contributory negligence upon the part of such injured claimant. * * *

This Act was vetoed by the then Governor, the Honorable Henry Horner, and for one of the reasons for this veto, he said:

"It will be noticed that the first purpose of the bill is to exclude the words 'in equity and good conscience' from the present law; that under the next provision the State is made liable in all instances where it would be liable if suable; that under the next provision the doctrine of respondeat superior is said not to be applicable to the State; and that under the next provision the State is made liable for the 'wilful and wanton act, or conduct, or the negligence of an employee of the State' if there is no contributory negligence on the part of the claimant.

"The effect of the amendment seems to be, first, to make the State liable in all instances where a private person or private corporation would be liable; second, to exempt the State from liability under the doctrine of respondeat superior; third, to make the State liable (a) for the wilful and wanton act of a State employee and (b) for the negligence of a State employee. This latter provision would again seem to make the State liable in all instances where a private person or a private corporation would be liable. Had there been no reference to the doctrine of respondeat superior and the State had been made liable in all instances where a private person or private corporation would have been liable, the bill might have been constitutional in that respect. With an exemption of the State from the doctrine of respondeat superior and then a provision, the effect of which is to withdraw such exemption, the bill is left in such a state of uncertainty and confusion as to render it impossible of enforcement." (Veto Message, page 105.)

The 60th General Assembly of Illinois, in a desire to broaden jurisdiction of the Court of Claims, passed an Act to amend Section 6 of the Court of Claims Act, to read as amended:

"To authorize the Court to hear, determine and allow claims against the State for damages on account of death or permanent injury of persons other than employees of the State, when the death or permanent injury is caused by wilful and wanton negligence of an employee of the State while acting in the course of his employment, and when the person killed or permanently injured is guilty of no contributory negligence."

This Act was disapproved by Governor Horner, who in his Veto Message (Veto Messages, page 56) said :

“* * * The rule is well established that a State is not liable for the negligence of its employees, as the doctrine of respondeat superior does not prevail in such cases. The enactment of this bill into law will certainly be attended with disastrous consequences. No one can estimate the increased financial burden that would be placed upon the State. It is quite probable that the total number of claims filed annually in the Court of Claims against the State would be at least doubled. There is no limitation whatever upon the amount of recovery in case of either death or permanent injury. Not only the general public but also all of the inmates of our penal and charitable institutions would be included in its scope and authorized to file claims and secure awards in case of permanent injury or death caused by the wilful and wanton negligence of an employee of the State. * * *”

“The Court of Claims will, under its usual procedure, be greatly handicapped in passing upon this type of cases.” * * * “If this bill were to become law, it would only be the first step in extending the responsibility of the State for acts of its employees. Next, it would be made liable in cases of simple negligence. Later, it is conceivable that the fact that a State employee was involved in the accident, might be made prima facie evidence of negligence on his part. The State—and particularly the Division of Highways, has been carrying on an extensive and intensive campaign to cause its employee to obey traffic rules and regulations and to exercise caution at all times for their own safety and for that of the public generally. This campaign has produced gratifying results with a greatly reduced number of accidents in which State employees were involved. This bill would tend to remove the feeling of personal responsibility and thereby undo the recent successful work along these lines. In all cases the claimant would charge wilful and wanton negligence and if recovery were secured the employee would escape at least the civil consequences of his act.”

In the case of *Lillian Pelli, Administratrix, etc. vs. State*, 8 C. C. R. 324, the Court denied an award claimed under the “equity and good conscience” theory and, in doing so, said: “in denying this claim we do so without and prejudice against any other right or procedure which claimant deems advantageous to follow.” Subsequently, the 59th General Assembly passed “An Act Making an Appropriation to the Estate of Adolph Pelli.” This Act made an appropriation of \$6,000.00 to Lillian Pelli, as

damages for the death of her husband Adolph Pelli, while a patient in the Elgin State Hospital. The appropriation was disapproved by the Governor, the Honorable Henry Horner, who, (Veto Message, page 110) said:

"The Court of Claims has heard the evidence in this case and has denied the claim in an opinion, the soundness of which cannot be questioned. The court deals with the claim on legal grounds. It calls attention to the long established policy of this State in such matters and adds that 'the State cannot be properly asked to respond in damages for injuries sustained by any inmate of such institutions, whether due to the acts of other inmates or of attendants and employees therein.' The court refers to its own records and to the decisions of other courts to sustain itself in denial of this claim.

"It discusses the theory of 'equity and good conscience' and says that 'the facts in this case would appeal to the good conscience of any court but public policy has long established and the court is committed to the rule that the State can not be held to respond in damages arising out of the negligent acts of its employees or for injuries suffered by patients in its various penal and charitable institutions.' The facts in this case do appeal to our sympathy but as the Governor of this State I realize what great danger lies in the establishment of a precedent that will open the State treasury to claims for damages for the 'negligent acts of the State's employees for injuries suffered by inmates of its penal and charitable institutions.' To depart now from the long established policy of the State by approving this claim I should be setting a precedent the consequences of which might be disastrous to our State.

"Attorney General Kerner advises me that 'it seems clear in this case that there is no legal obligation upon the State.'

"I would set a bad precedent if I should approve this bill. Hence, I return it with my disapproval."

In the case of *Russell Johnson, Assignee, etc. vs. State*, 12 C. C. R. 157, we concluded that

"The Legislature has so far determined that the greatest good to the greatest number of citizens of this State is best served by limiting the jurisdiction of this Court to claims stated upon a legal or equitable cause of action against the State. If the Legislature has erred in this respect, arguments of equity and good conscience should be directed to it, rather than to this Court."

While we are reluctant to dismiss a claim of this kind, yet, in view of the law as it now stands and our consistent interpretation of the law, we have no authority

whatsoever to grant an award, and have no alternative but to grant the motion of the Attorney General to dismiss the complaint.

The motion to dismiss is allowed and the claim dismissed.

(No. 3890—Claim denied.)

SUNFLOWER PETROLEUM PRODUCTS CORPORATION, ET AL,
Claimants, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed *April 17, 1945.*

BROWN, HAY & STEPHENS, for claimants.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

COURTS OF GENERAL JURISDICTION—*Court or Claims will not take jurisdiction of matters pending or undetermined by courts of general jurisdiction.* Where the basis of the complaint is merely a conclusion that the claimant is liable to its vendors, upon its contracts for the purchase of casinghead **gas**, for the amounts withheld for the payment of the illegal tax, and that it must respond to them either for breach of contract, or for conversion of their funds, the claim is prematurely filed and the Court of Claims will not take jurisdiction of matters pending or undetermined by courts of general jurisdiction.

ECKERT, J.

The Illinois General Assembly, at its 1941 regular session, passed an Act entitled, "An Act in relation to a tax upon persons engaged in the business of producing oil in this state, and providing for the collection and payment of the tax by persons handling or receiving the oil so produced," commonly known as the Oil Production Tax Act. It became effective July 1, 1941, and was administered by the Department of Finance (subsequently the Department of Revenue). The Department promulgated rules and regulations and determined what products fell within the definition of "oil" as provided in

Section 1. The Act was held unconstitutional and invalid in its entirety by the Illinois Supreme Court on March 21, 1944. (*Ohio Oil Co. vs. Wright*, 386 Ill. 206.)

The claimant, the Sunflower Petroleum Products Corporation, is an Illinois corporation formed by the merger, on March 30, 1943, of the Sunflower Natural Gasoline Company, and the Sunflower Gasoline Corporation. The name of the Sunflower Gasoline Corporation was changed, after the merger, to that of Sunflower Petroleum Products Corporation, and the latter company thus became the owner of all the assets of both the Sunflower Natural Gasoline Company and the Sunflower Gasoline Corporation, as well as subject to all the liabilities of the two corporations.

From the effective date of the Oil Production Tax Act, the Sunflower Petroleum Products Corporation, or one of its corporate predecessors, has been engaged in the manufacture of various products from casinghead gas. The Department of Finance ruled that the "producers" subject to tax under the Act, were the persons who owned interests in the casinghead gas at the time it came out of the oil wells; that the Sunflower Petroleum Products Corporation was a "receiver" as the term was defined by the Act; and that as such "receiver" it was required to collect the tax imposed by the Act from the persons from whom it purchased the casinghead gas.

In its complaint, the Sunflower Petroleum Products Corporation alleges that because of the rulings of the Department of Finance, and to avoid the severe penalties provided by the Act, the corporation, or its corporate predecessors, applied for, and were licensed and qualified, to act as receiver under certificates issued by the Department, and that in accordance with the rules and regulations, and to avoid the penalties, it withheld each

month, from the amounts payable to the owners for the casinghead gas which it purchased, an amount equal to the oil production tax as determined by the rules of the Department. Paragraphs 18 and 19 of the complaint are as follows :

“18. Said taxes so illegally collected by said Department of Finance and said Department of Revenue from said Sunflower Natural Gasoline Company, Sunflower Gasoline Corporation and Sunflower Petroleum Products Corporation are the property of the following named persons, the aggregate amount due each being given, and said Sunflower Petroleum Products Corporation files this claim on the basis of each and all of them.

The Texas Company	\$7,791.43
Kingwood Oil Company..	605.49
Tex Harvey	55.46
Swan-King	8.39
Ohio Oil Company..07
Fess & Miller..	1.34
John Pugh	23.94
Shell Oil Company	273.01
H. H. Wegener	104.55
J. W. Menhall..	37.07
C. F. Frazier..	23.37
Glenwood Oil Co.	2.73
W. C. McBride.	26.82
T. M. Pruett.	6.96
W. O. Morgan	17.21
	<hr/>
	\$8,977.84

“19. Said Sunflower Petroleum Products Corporation files this claim on behalf of each of said persons, and prays that awards be made to each of said named individuals in the amount shown opposite each name.”

Claimant then prays that the court will render awards in favor of the persons named in the amounts stated in paragraph 18.

The respondent has filed a motion to dismiss the complaint on the ground that it is substantially insufficient in law in the following particulars:

"1. A cause of action is not stated upon which the State would be liable if it were suable at law or in equity.

"2. The claim presented is barred for the reason that the claimant had an adequate remedy in the courts of general jurisdiction, as provided in Chapter 127, Paragraph 172, Illinois Revised Statutes 1943.

"3. This claim is made for refund of a tax voluntarily paid with a full knowledge of all the facts, and such a payment may not be recovered in the absence of a statute to the contrary, although the tax is illegal or unconstitutional."

In support of its motion, the respondent contends that claimant has alleged the payment of a tax under a statute subsequently held to be unconstitutional, but has not alleged the existence of any law giving claimant, the right to a refund of the amounts paid under the unconstitutional statute; that unless claimant brings itself within the provisions of a law giving it the right to a refund, the claim must be dismissed; that claimant failed to avail itself of the statutory remedy by which it could have secured a refund in courts of general jurisdiction of the taxes paid under the unconstitutional statute; that a claimant who has a remedy in courts of general jurisdiction may not maintain an action in this court; and that a refund of a tax paid voluntarily, with a full knowledge of all the facts, may not be made in the absence of an authorizing statute, although the tax is found to be illegal or unconstitutional.

The claimant concedes that respondent's motion would be properly directed to the complaint, and that the arguments in support of the motion would correctly state the law, if the claimant were a taxpayer attempting to secure an award for taxes paid under a statute subsequently held to be unconstitutional. But claimant contends it was not such a taxpayer; that, as agent of the State, it collected a tax which it was required to collect by statute and department regulations; that it paid the tax to its principal; and that the tax has now been found

to be illegal. Claimant then contends it is contractually liable to those persons from whom it collected the tax, and therefore should be indemnified.

Under the provisions of the Oil Production Tax Act, claimant was clearly not a taxpayer, but an agent of the State to collect the tax. Claimant does not appear in this suit as a taxpayer seeking a refund of taxes paid either under a mistake of law or of fact nor as a taxpayer seeking a refund of taxes illegally paid. There was no provision in the Act imposing any of the burden of the tax on the "receiver," and the "receiver" was merely the agent of the State to collect the tax. As such, claimant had no adequate remedy in courts of general jurisdiction.

On the other hand, there is nothing in the complaint, except the conclusion of the pleader, that the claimant is liable to the taxpayers for the collection of the illegal tax. Whether or not such liability actually exists is a matter to be determined by courts of general jurisdiction, if the claimant is sued. It must there be determined whether or not claimant has a defense, based, possibly, upon a statute of limitations, or possibly upon the failure of the taxpayers to avail themselves of remedies which they may have had in courts of general jurisdiction, or possibly upon other grounds of which claimant may well have special knowledge.

Claimant has not set up a cause of action; it has not alleged that any liability has been established in a court of competent jurisdiction on account of its collection of the illegal tax. The basis of the complaint is a conclusion that the claimant is liable to its vendors, upon its contracts for the purchase of casinghead gas, for the amounts withheld for the payment of the illegal tax, and that it must respond to them either for breach of con-

tract, or for conversion of their funds. Claimant has suffered no more damage now than at the time it collected the tax, and it admits that at that time it had no cause of action: At best, the claim is prematurely filed. The court will not take jurisdiction of matters pending or undetermined by courts of general jurisdiction. *Barrett vs. State*, 13 C. C. R. 13.

The cases arising under the Motor Fuel Tax Act, cited by both claimant, and respondent, are not in point. In the case of *Silver Fleet Motor Express, Inc. vs. State*, 10 C. C. R. 396, the claimant, as tax collecting agent for the State, was actually out of pocket because of an error in the reports made to the State. The moneys it claimed were its own, owing to it because of a factual error, and were not tax moneys which it had illegally collected from others. The same is true of the case of *Mitchell and Hills vs. State*, 12 C. C. R. 317. In *Breen, Trustee, vs. State*, 12 C. C. R. 285, the claimant corporation erroneously failed to deduct the expenses of the tax collection, to which it was entitled under the Act. In each of these cases the claim was for moneys actually due the agent, not for moneys which the agent collected from taxpayers under an unconstitutional statute and for refund of which the agent might or might not be liable.

For the reasons stated, respondent's motion to dismiss is granted. Case dismissed.

(No. 3452 — Claimant awarded \$222.99.)

RALPH JOHNSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1945.

SHARL B. BASS AND GREENBERG & SACHS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when an award may be made under.* Where it appears that an attendant at Manteno State Hospital became ill with typhoid fever, during an epidemic of typhoid fever which existed at the Hospital at that time, an award may be made for necessary medical and nursing expenses and for total temporary disability during illness under the Workmen's Compensation Act.

SAME—*permanent total disability—failure of evidence to support claim.* Where evidence insufficient to support claim that alleged disability is result of his sickness from typhoid fever, an award will be denied.

FISHER, J.

Claimant, Ralph Johnson, was employed as an attendant at the Manteno State Hospital, and while so employed, on August 15, 1939, became ill with typhoid fever. Claimant alleges that as a result of said sickness he incurred expenses for medical and nursing services in the sum of \$279.18. Claimant seeks an award for the amount of his expenditures for such medical and nursing services; also for impaired vision, the loss of the use of his legs, and for diminished hearing; all being a result of his said sickness.

The record consists of the Complaint, Stipulation, Deposition, Report of the Medical Examination, and Waiver of Statement, Brief and Argument by both Claimant and Respondent.

At the time of claimant's illness an epidemic of typhoid fever existed at the Manteno State Hospital, and claimant was required to care for and attend patients suffering from typhoid fever. We have heretofore held that an employee contracting typhoid fever under such conditions is entitled to the benefits under the Workmen's Compensation Act. *Mary Ade vs. State*, 13 C. C. R. 1.

Claimant was examined on January 25, 1945, at the Chicago State Hospital by Dr. Carl Popper, a staff physician, a report of which examination was filed herein

on February 16, 1945, and discloses that claimant suffered from some disability in his right leg; that his eye sight is normal; and that his hearing is diminished in the right ear. The history of the case is a perforated right ear drum and weakness in the right leg.

Testifying in behalf of claimant, Dr. Alfred H. Mitchell of Chicago, testified that claimant had an involvement of the sensory branch of the spinal nerves which supply the area over the lower surface of the right thigh at its lower half, which he called neuritis. Dr. Mitchell said that in his opinion, this neuritis *could be* a complication following the attack of typhoid. He said further, "There are cases on record of that particular complication. They are not frequent, but they do occur." On cross examination, Dr. Mitchell admitted that "there are several diseases which could cause this thing other than the complication of typhoid fever."

Dr. Alfred H. Herman, 30 North Michigan Avenue, Chicago, Illinois, testifying in behalf of claimant, said that his right ear showed a drum with markedly distorted land marks. There was a small perforation in the posterior anterior quadrant. When asked if, in his opinion, there was any causal relationship between the loss of hearing at the present time and the attack of typhoid fever, said "there might or could have been some effect on his hearing." Also, on cross examination, Dr. Herman said that the diminished hearing might have been the result of some other disease.

The evidence is entirely insufficient to support the claim that claimant's alleged disability is a result of his illness from typhoid fever.

Claimant was required to obtain medical and nursing

\$11.18 for medicine, and **\$123.00** to Dr. O. H. Phipps—a total of \$279.18—all of which was paid by claimant, and for which he is entitled to be reimbursed.

Claimant's illness began on August 16, 1939, and he returned to work on December 12, 1939, in the same capacity and at the same salary. He was entitled to receive for total temporary disability during his illness, the sum of **\$11.04** per week for 17 weeks, or a total of **\$187.68**. He was paid his full salary during the period of his illness, or the sum of **\$243.87**. Claimant thus received **\$56.19** for unproductive time during his illness, **which** amount must be deducted from the amount due him, leaving a balance due claimant of **\$222.99**.

An award is therefore made in favor of claimant, Ralph Johnson, in the total sum of **\$222.99**, all of which is accrued.

(No. 3583—Claim denied.)

SAMUEL D. LYMAN, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1945.

SHAPIRO AND LAURIDSEN, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—claimant employed as cook at Manteno State Hospital—contracted typhoid fever which allegedly resulted in thrombophlebitis in left leg—when evidence insufficient, claim will be denied. Where record fails to show that claimant had suffered and will continue to suffer permanent partial disability, claim for compensation therefor cannot be sustained. The burden of proof is upon claimant to show such disability and to establish his right to compensation therefor by a preponderance or greater weight of the evidence, and no award can be based upon speculation, surmise or conjecture.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

- This complaint was filed on the 7th day of February, 1941. It is for benefits under the Workmen's Compensation Act.

The complaint states that Samuel D. Lyman, the claimant herein, was on the 30th day of September, 1939, in the employ of the respondent as a cook at Manteno State Hospital. That on the last-mentioned date, he contracted typhoid fever in said institution and as a result thereof, thrombophlebitis developed in his left leg, following the attack of typhoid fever.

The record consists of the complaint, stipulation, report of the Department of Public Welfare, report of Dr. T. J. Pasqueri, dated April 15, 1943, report of Dr. Courtland L. Booth, dated March 7, 1945, verified bill of particulars, waivers of statement, brief and argument on behalf of claimant and the respondent.

No evidence was taken in this case and the claimant relies on the verified reports of the two above-named physicians to support his claim for disability.

Claimant is not available for a personal observation by the members of this Court, he now being in the Draft Department of the Oregon Shipbuilding Corporation in the State of Oregon.

Claimant's bill of particulars sets up items for nurses salaries, drugs, massage treatments, rubber stockings, and bandages, amounting to the sum of \$407.50, which he claims to have expended. There is nothing in the record to indicate that these services were necessary and that the charges therefor were reasonable. The report of the Department of Public Welfare shows that claimant's wages were paid to him during the period of his illness, amounting to approximately \$409.00. It also shows that the respondent paid the claimant's mother the sum of \$119.16 for nurse hire, and further that all neces-

sary hospital facilities and physician's services were furnished by the respondent at the Manteno State Hospital.

This record is not sufficient to enable this Court to ascertain, with certainty, whether or not claimant is entitled to an award for any part of the claim he makes in his complaint, or bill of particulars. He is seeking an award as follows:

To doctor bills, nurses bills, special diet, etc. (estimated)....	\$ 400.00
To medicine, supplies, etc. (estimated).....	150.00
To claimant, as provided under the Workmen's Compensation Act of the State of Illinois..	5,000.00

If this claimant has sustained a permanent injury to his left leg, evidence should be taken, and if the claimant was required to expend monies in the effort to be cured, evidence should be taken in support thereof, and the respondent should have the opportunity to be present at the time of the taking of said testimony.

Where claim is made for compensation for permanent partial disability, the burden of proof is on claimant to show such disability and to establish his right to compensation therefor by a preponderance, or greater weight, of the evidence, and no award can be based upon speculation, surmise, or conjecture. *Mandell vs. State*, 12 C. C. R. 49.

Where, after giving full credence to the medical and other testimony adduced by claimant, the record fails to show that claimant had suffered and will continue to suffer permanent partial disability' claim for compensation therefore cannot be sustained, and an award must be denied. *Egglee vs. State*, 12 C. C. R. 386. *Cross vs. State*, 13 C. C. R. 174.

Claim denied.

(No. 3802—Claimant awarded \$1,159.00.)

FRANKLIN R. DOVE, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1945.

A. L. YANTIS, for claimant.

'GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SALARY—when award may lie made for services of court reporter—Circuit Judges authorized to appoint same. Where it appears that the services of a court reporter were necessary to a Circuit Court Judge and that such services were actually rendered and that claimant, the Judge, was authorized by Statute (Sec. 164 (a), Chap. 37, Illinois Revised Statutes) to procure said services for which the State has not paid, claimant is entitled to be reimbursed for his reasonable expenditures shown to have been made therefor.

FISHER, J.

Claimant is a duly elected, qualified and acting Judge of the Circuit Court of the Fourth Judicial District of Illinois, which position he has held continuously since his election in June, 1922. Since November 7, 1942, claimant has not appointed a regular court reporter and has been required, on numerous occasions, to secure the services of various competent reporters on a day to day basis where such services were required. Claimant has compensated and paid these reporters from his own funds, all in the sum of \$1,159.00, to recover which amount as set forth in detail in the verified complaint, claimant seeks an award.

The record consists of the Complaint, Supplemental Complaint, Stipulation, and Statement, Brief and Argument in behalf of respondent.

The facts herein are not in dispute. Due to inability to secure the services of a regular court reporter on and after the 7th day of November, 1942, claimant was required, on numerous and various occasions, to engage the

services of a court reporter for the purpose of recording proceedings of the court, and claimant paid these reporters from his own funds, all in the amount of \$1,159.00.

"Each of the several judges of the Circuit, Superior and City Courts in this State is authorized to appoint one official shorthand reporter, who shall be skilled in verbatim reporting, and who shall have been a bonafide resident of the State of Illinois for one year, and whose duty shall be as hereinafter specified. * * *"

Sec. 163 (a), Chap. 37, Illinois Revised Statutes.

Claimant clearly was authorized to appoint an official court reporter. Compensation for the services of such reporter is provided by appropriations from the Treasury of the State of Illinois.

We have heretofore held, that upon proper showing an award may be made for the services rendered by a court reporter of the Circuit Court.

Shell vs. State, 8 C. C. R. 235.

Cox vs. State, 10 C. C. R. 381.

Claimant, as an officer or agent of the respondent, has secured services which he was authorized to procure by the respondent; respondent has not paid for the services so secured; and claimant has paid for the said services from his own funds in order to carry on the business before the court. Because of the present existing conditions, claimant has been unable to comply with the directory provisions of the statute regarding appointment of a reporter and, therefore, no payment for the said services has been made by the respondent.

It appears that the services of a court reporter were necessary to the claimant and that such services were actually rendered. It further appears that had a regular court reporter been appointed, far greater sums than that now asked by the claimant would have been ex-

pended by the respondent for the services rendered. As this court has previously held that an award may be had for the services rendered by a court reporter, and the claimant was authorized by statute to procure said services, for which respondent has not paid, claimant is entitled to be reimbursed for his reasonable expenditures shown to have been made therefor.

An award is therefore entered in favor of the claimant, Franklin R. Dove, in the sum of One Thousand One Hundred Fifty-nine Dollars (\$1,159.00). •

(No. 3803—Claimant awarded \$2,293.21.)

LULA THOMPSON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1945.

JOSEPH W. KOUCKY, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employee at Chicago State Hospital within provision of—accidental injury resulting in permanent loss of use of left leg—compensable under.* Where it appears an employee at Chicago State Hospital while engaged in the performance of her duties at said institution, sustained an accidental injury resulting in a 75% permanent loss of the use of her left leg, she is entitled to compensation for such permanent injury and to an award for temporary total disability, in accordance with the provisions of the Workmen's Compensation Act upon compliance by the employee with the requirements thereof.

ECKERT, J.

On April 12, 1943, the claimant, Lula Thompson, an employee of the respondent at the Chicago State Hospital, while in the discharge of her duties supervising a group of patients, fell and sustained a fracture of the neck of the left femur with displacement in posterior rotation.

The wage of the claimant for the year next preceding her injury was \$1,060.80, or an average weekly wage of \$20.40. She had no children under sixteen years of age; her compensation rate is therefore \$10.20, plus 10%, or \$11.22. The respondent furnished medical, hospital and surgical services in part only, and paid claimant temporary total disability for a period of six months following the injury. Claim is made for further temporary total compensation, for reimbursement for additional medical, hospital, and surgical expenses paid by claimant, and for permanent loss of use of claimant's left leg.

At the time of the accident, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Immediately after the injury occurred, claimant was taken to the employees' hospital unit at the Chicago State Hospital where x-rays were taken, and claimant was placed under the care of Dr. George Procopie, a part time physician and surgeon employed by the respondent. She remained under his care until January 7, 1944.

On April 29, 1943, an operation was performed to reduce the fracture and to insert a Smith-Peterson nail. At the request of the claimant and her family, Dr. Nathan Lans assisted Dr. Procopie in this operation. Claimant paid Dr. Procopie \$200.00, and Dr. Lans \$80.00 for these services. Claimant also paid a charge of \$8.00 for the Smith-Peterson pin, and a charge of \$60.00 for a portable x-ray incurred because claimant could not be moved to the x-ray room of the Chicago State Hospital, which had no portable machine.

Following the operation, a union did not occur, and there was some disagreement between Dr. Procopie and Dr. Lans as to further treatment. In January, 1944, claimant told Dr. Procopie that she wanted to go to Grant Hospital to have an operation performed there by Dr. Lans. Dr. Lans notified Dr. Procopie to the same effect on the same day, and claimant was accordingly removed under the direction of Dr. Lans to Grant Hospital. At Grant Hospital, a Schantz Osteotomy was performed on claimant's left hip, by Dr. Seidler and Dr. Lans. This resulted in a shortening of the left leg. Claimant remained in Grant Hospital for three weeks, and was then returned to the Chicago State Hospital where she was attended by Dr. Lans. Dr. Seidler and Dr. Lans made a charge of \$200.00 for the second operation, which was also paid by claimant, and Dr. Lans made a charge of \$50.00 for his care subsequent to the second operation. This item remains unpaid. The charges of Grant Hospital were \$208.90, and there was a charge of \$14.00 for ambulance to return claimant from the Grant Hospital to the Chicago State Hospital. ,

Claimant remained in the Chicago State Hospital until June 27, 1944, a period of sixty-three weeks of hospitalization; and continued to be totally disabled for several months, after her discharge. Testifying in her own behalf, she stated that her left knee is now very stiff, that she can not bend her hip, that she has difficulty putting on her shoes and stockings, that she can not bend over far enough to tie her shoe strings, and that her left ankle and knee are both swollen.

Dr. Albert C. Field, called as a witness on behalf of claimant, testified that he first examined claimant on August 3, 1944, and that he took x-rays at that time. He stated that from his examination and from the x-rays, he

found that claimant's left knee was swollen, measuring $17\frac{1}{4}$ inches, whereas her right knee measured 16% inches; that there was some atrophy in claimant's left thigh, which measured $16\frac{1}{4}$ inches, whereas the right thigh measured $16\frac{3}{4}$ inches; that the left knee was held in a flexed deformity; that there was limitation of extension of about twenty-five degrees; that the left knee was "practically ankylosed"; that there was little abduction in the left hip, and a little internal and external rotation. The doctor testified that the condition of the left hip was permanent and that in his opinion claimant had lost all industrial use of her left leg.

Dr. Lans testified that claimant's left leg is now about an inch and three-fourths shorter than her right leg; that as a result of this shortening, she limps and has difficulty in stooping down; that she suffers no pain, but that the leg is ankylosed in the socket; and that the ankylosis interferes with the movement of the leg in the socket. Dr. Lans also testified that in his opinion, claimant had lost all industrial use of her left leg, and that the condition is permanent.

From a consideration of the medical testimony, from an examination of the x-rays submitted in evidence, and from personal observation of the claimant, the court is of the opinion that claimant has suffered a seventy-five per cent permanent loss of use of her left leg. She is, therefore, entitled to an award of 75% of 190 weeks at \$11.22 per week, or \$1,598.85 for such permanent injury.

Claimant is also entitled to an award for temporary total disability for a period of not to exceed sixty-four weeks, as provided by Section 8(e) of the Workmen's Compensation Act, at \$11.22 per week, or \$718.08. From this amount must be deducted the compensation paid to her during the six months immediately following the in-

jury, or the sum of \$291.72, leaving a balance due claimant of \$426.36.

Claimant is also entitled to be reimbursed for part' of the medical services incurred and paid by her, to-wit :

For the services of Dr. Procopie.....	\$200.00
For the use of the portable x-ray.....	60.00
For the use of the Smith-Peterson pin..	8.00
	<hr/>
Or a total of.....	\$268.00

No other medical, surgical, or hospital services can be allowed, however, because claimant elected to secure her own physician, surgeon, and hospital services at her own expense.

Award is therefore entered in favor of the claimant in the sum of \$2,293.21, payable as follows:

1. The sum of \$268.00 reimbursement for medical services, payable forthwith.
2. The sum of \$426.36, the balance due on account of temporary total disability, payable forthwith.
3. The sum of \$493.68 on account of permanent, specific injury, which has accrued, and is payable forthwith.
4. The balance of \$1,105.17 in weekly installments of \$11.22 per week beginning May 8, 1945, for a period of 98 weeks with an additional final payment of \$5.61.

(No. 3815—Claimant awarded \$1,803.17.)

MARIE GIELOW, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1945.

J. W. HORWITZ AND A. B. LITOW, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employee at Elgin State Hospital withan provasaons of—accidental injury resulting in permanent loss of the use of raght arm—compensable.* When the evidence shows that an employee at Elgin State Hospital while engaged in the performance of her duties at said institution, was attacked by an insane patient, and sustained injuries resulting in *a* permanent loss of 75% of the use of her arm, an award may be made for such total permanent disability and for temporary total disability, in accordance with the provisions of the Workmen's Compensation Act upon compliance by the employee with the requirements thereof.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint was filed October 29, 1943, for benefits under the Workmen's Compensation Act.

The complaint alleges that Marie Gielow was employed by the respondent at the Elgin State Hospital as an attendant and on the 9th day of December, 1942, she was injured by reason of an accident arising out of and in the course of her employment by the State of Illinois; that the respondent paid her for her services, as such attendant, the sum of \$52.00 per month plus room and board; that on the last-mentioned date, she was attacked by an insane patient who knocked her to the floor in said institution, causing her to fall, injuring her right elbow, which has caused her to suffer the loss of use of her right arm.

The record consists of the complaint, departmental report, transcript of evidence and abstract of same, statement, brief and argument of claimant, and brief and argument of the respondent.

The evidence in this case was taken on March 19, 1945. At the time of the taking of the evidence, a stipulation was entered into by and between the parties hereto; that the claimant and respondent were operating under the Workmen's Compensation Act and that the relationship of employer and employee was existing be-

tween the claimant and respondent at the time of the injury; that said injury arose out of and in the course of her employment, and that notice of said injury was served upon the employer and claim for compensation was made within the time stipulated by the Act; that the annual wage of claimant was **\$642.60** plus room and board; that the age of the claimant at the time of the accident was **46** years, and that she had no children under the age of **16** years dependent upon her; that medical care and hospitalization was furnished; that no compensation was paid to claimant while she was in the hospital; that the questions to be decided by this Court are, first, the nature and extent of the injury, if any, and the claim for medical and temporary total compensation due, if any.

The claimant testified that the last treatment she received by the respondent was in **May, 1943**, because she did not have the money to go back and forth to the Research Hospital for treatment, and at that time, her arm felt very stiff; that she could not work it the way she wanted to and the loss of functional use in the arm was a great handicap to her in many ways; that she could not make a real fist and that she could not do many things that she had been in the habit of doing prior to the injury; that her knuckles were stiff and she was unable to bend her arm in some directions; that her fingers were stiff and she had a numbness over her knuckles. Prior to the injury, the arm was in perfect condition; that now the only work she is able to perform is dish washing; that she found employment on the 8th day of June, **1943**, and until the last-mentioned date, she was unemployed due to the condition of her right arm.

Dr. **S. I. Weiner** was called to testify on behalf of the claimant. He testified he was graduated from the

University of Illinois College of Medicine, having graduated in 1924; that he examined claimant on the 29th day of January, 1945, and found objectively that claimant's right arm revealed about 15 degrees lacking in extension of the elbow, 45 degrees lacking in supination of the elbow. At the wrist, there were 30 degrees lacking in dorsal flexion, and 30 degrees in palmer flexion. At the hand, the knuckles were 20 degrees lacking in flexion at each of the knuckle joints of the forefingers. A fist could not be made; that the examination further revealed a disturbance of sensation known as a hypoalgesia. This disturbance was confined to the base of the ulnar and medial nerve of the hand. Measurements of the right arm were taken, resulting in the following: There was an atrophy, or shrinkage, in the right arm so that circumference around the biceps, the muscle, was 12" in comparison with $12\frac{3}{8}$ " on the left side. He testified that on a right-handed person, the circumference of the biceps should be larger by variable amounts, ranging from one-half to a quarter of an inch. The measurement of the right forearm was $10\frac{1}{4}$ " in comparison with $10\frac{3}{8}$ " in the left forearm. In this instance also, in a right-handed individual, the circumference in the right forearm should be from one-half to a quarter of an inch larger than the left. In this instance, it was smaller. At the middle joints of the fingers, there was a deformity in flexion of 15 degrees so that the fingers could not be straightened. He further testified that he then took x-rays of the right elbow, including one-half the arm and forearm. The lateral view showed fracture of the anterior part of the ulna extending into the joint of the elbow. This fracture line is about 2" in length and shows an outward displacement of the articular part of the distal fragment. Union has not been complete. In the center of the fracture

where the opposing surfaces of the fracture are, there is a destruction of bone for a distance of about 1" in length and about $\frac{3}{8}$ " in width. There is a marked narrowing of the elbow joint on the ulna side to about one-third the width that it is found on the radial side. There is also a periostial traumatic roughening of the superior margin of the olecranon process of the ulna. From the neck of the radius near the elbow, there is a sharp-pointed, bony spur, which shows that there has been some trauma to the head of the radius. At the joint between the ulna and the radius at the elbow, there is a separation, distortion and a roughening.

Dr. Alan E. Lieberman was called on behalf of the respondent. He testified that he was a graduate of the University of Chicago and Rush Medical College; that he saw the claimant the day following the injury; that it was his opinion that she had suffered an extremely complex fracture of the right arm and one that warranted expert opinion and treatment; that he immediately made arrangements to have her taken to the Illinois Research Hospital where she could be treated and attended by orthopedic surgeons; that she was hospitalized in the Illinois Research Hospital; that her arm and elbow were encased in a huge body cast. She was later returned to the Elgin State Hospital, where she completed her convalescence. He testified, after making an examination the day his testimony was given, that she now has a chronic residual defect in muscle and joint function, especially involving the wrist and fingers of the right hand; that the disability is a rather severe one and will probably seriously limit her ability to do very much with her right hand; that she would not be able to do the things that require fine movements of the right hand, and

because of her condition, she would not be able to pass a physical examination to be re-employed as an attendant.

From a careful consideration of the entire record and a personal observation of the claimant by the Court, we make the following findings :

That the earnings of the claimant, or her predecessor, during the year preceding the accident was \$918.00 per annum, and that her average weekly wage was \$17.65, making her compensation rate \$9.70; that the claimant at the time of the injury was 46-years of age, unmarried, and had no children under 16 years of age dependent upon her for support; that all necessary first aid, medical, and surgical services were provided, or offered, by the respondent ; that claimant was temporarily totally disabled from the date of her injury as aforesaid until June 3, 1943, to-wit, for a period of 25 weeks; that she also suffered the permanent loss of 75% of the use of her right arm.

We further find that claimant is entitled to have and receive from the respondent the sum of \$9.70 per week for 25 weeks for temporary total disability in accordance with provisions of Section 8, Paragraph (b) of the Workmen's Compensation Act, amounting to the sum of \$242.50 and the further sum of \$9.70 per week for a period of $168\frac{3}{4}$ weeks, amounting to the sum of \$1,636.88, for the permanent loss of 75% of the use of the right arm in accordance with the provisions of Paragraph (e) of Section 8, of the Act.

An award is therefore entered in favor of claimant in the sum of \$1,879.38. From this amount, there must be deducted the sum of \$76.21 heretofore paid to claimant by respondent for non-productive work from December 9, 1942, to January 14, 1943, leaving a balance due claimant of \$1,803.17, payable to claimant at \$9.70 per

week. Of this amount, the sum of \$1,222.20 accrued to May 10, 1945, and is payable in a lump sum forthwith. The remainder of said award amounting to \$580.97, to be paid to claimant in weekly installments of \$9.70 for 59 weeks and one week at \$8.67.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3829—Claim denied.)

JAMES A. BUTTERWORTH, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed, May 8, 1945.

UNGARO & SHERWOOD AND J. ARTHUR KEALEY, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

ILLINOIS RESERVE MILITIA—*claim for damages to airplane used by claimant—risk of loss incident to employment—no provision by law for recovery.* Where a captain in the Air Corps of The Illinois Reserve Militia smashed his airplane during a flight made in accordance with instructions from his superior officer—such loss or damage is a risk incident to the employment and since the State does not insure the property of an employee there is no basis in law by which he can recover for such loss.

ECKERT, J.

The claimant, James A. Butterworth, is a captain in the Air Corps of the Illinois Reserve Militia. Pursuant to orders of the Adjutant General, Captain Butterworth was on active duty with headquarters at Jacksonville, Illinois, from May 23, 1943, to June 3, 1943. During this period he owned and operated a Waco model airplane, and on May 26, 1943, pursuant to orders, took off in this

plane from an airport at DuQuoin, Illinois, and proceeded to his base at Jacksonville, Illinois.

During this flight, a landing was made to investigate flood conditions, which claimant alleges was in accordance with the instructions of his superior officers. When claimant next attempted to take off, the plane smashed into a ditch and was severely damaged. Subsequently, claimant sold the wreckage for \$400.00, and he now seeks an award for the difference between \$3,000.00, the alleged value of the plane, and the amount of \$400.00, or \$2,600.00, or, in the alternative, the sum of \$1,746.00, which was the lowest estimate which claimant received for the repair of the plane.

Claimant's complaint, however, fails to state a cause of action. Before claimant can obtain an award against the State, he must show that he comes within the provisions of some law establishing the State's responsibility. The State does not insure the property of an employee used by such employee in his employment. The possibility of such loss or damage is a risk incident to the employment. *Caslyn vs. State*, 9 C. C. R. 107; *Hupp vs. State*, 10 C. C. R. 360. Claimant's status, in substance, is that of an employee of the State, and the court is not aware of any provision of law by which he can recover for such loss as is alleged in his complaint.

Claim dismissed.

(No. 3891—Claimant awarded \$1,846.11.)

JOHN THOMAS MARTIN, Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed May 8, 1945.

VERNON G. BUTZ, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*carpenter at Kankakee State Hospital within provisions of accidental injury in course of employment—compensable under.* Where it appears that an employee at Kankakee State Hospital while engaged in the performance of his duties sustains an accidental injury resulting in the amputation of several fingers of his left hand, an award may be made for such permanent injury and for temporary total disability, in accordance with the provisions of the Workmen's Compensation Act upon compliance by the employee with the requirements thereof.

ECKERT, J.

Claimant, John Thomas Martin, employed by the respondent as a carpenter at Kankakee State Hospital at Kankakee, Illinois, was injured in the course of his employment on March 29, 1944. At the time of the accident, claimant was operating a joiner in the carpenter shop at the hospital, and while so employed, his left hand slipped into a power driven saw. As a result of the accident, the major portion of his first, middle, and ring fingers of the left hand were amputated.

At the time of the accident, the claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of the employment.

Claimant was temporarily totally incapacitated from March 29, 1944, to June 12, 1944, a period of 10-4/7 weeks. During the year immediately preceding the date of the injury, claimant earned a total of \$2,971.00, so that his compensation rate is the maximum of \$15.00 per week. Since the injury occurred subsequent to July 1, 1943, this maximum is increased 17½%, making a total compensation rate of \$17.63. Claimant is thus entitled to temporary total compensation for 10-4/7 weeks in the amount of \$186.37. While claimant was incapacitated, however, he was paid by the respondent the total sum of

\$103.26, so that there is due to claimant, on account of temporary total disability, a balance of \$83.11.

Claimant is also entitled to an award for the total loss of the first, middle and ring fingers of his left hand. Under the provision of the Workmen's Compensation Act, for such loss, he is entitled to 50% of his average weekly wage for a period of 40, 35, and 25 weeks respectively, or a total period of 100 weeks. At the compensation rate of \$17.63 per week, the total amount due claimant for permanent loss of the three fingers is \$1,763.00.

Award is therefore made to claimant in the amount of \$83.11 for the balance of temporary total disability, and in the amount of \$1,763.00 for permanent loss of the use of the first, middle, and ring fingers of his left hand, or a total award of \$1,846.11. Of this amount \$911.72 has accrued and is payable forthwith. The balance of \$934.39 is payable in weekly payments of \$17.63 each, for a period of 53 weeks.

(No. 3900—Claimant awarded \$4,700.00.)

MAE MUIR, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed May 8, 1945.

LEONARD W. STEARNS, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*claimant, the widow of deceased workman—pre-existing disease of workman prior to accidental injury — death results — disease aggravated or accelerated by accidental injuries — compensable under.* Where an employee of the State sustained accidental injuries resulting in his death, arising out of and in the course of his employment and the medical testimony disclosed that the deceased had been afflicted with a pre-existing heart ailment and other diseases, the rule applied on numerous occasions is that if the disease

is aggravated or accelerated in the course of his employment by accidental means and if death results therefrom, the death results from the injuries caused by the accident and is compensable. The Workmen's Compensation Act is not limited in its application to healthy employees.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

The claimant, Mae Muir, is the widow of William James Muir. She has filed this claim for an award under the Workmen's Compensation Act, for the death of her husband. The claim was filed on January 25, 1945, and the record was completed by claimant and respondent on April 11, 1945.

The record shows that deceased was employed by the Division of Highways from July 11, 1941, to March 31, 1944, as alaborer.

On December 6, 1942, Mr. Muir was shoveling cinders on to an ice-coated pavement from a moving truck, belonging to the Division. The truck stopped for Mr. Muir to throw cinders on an intersection. Without warning, the driver started the truck, throwing Mr. Muir to the pavement, bruising his back, hip, and legs.

On December 10, 1942, Mr. Muir reported to the Division of Highways that he was experiencing pain and requested treatment for his injuries. He was sent to Dr. H. B. Thomas, Professor and Head of the Department of Orthopedics, University of Illinois, College of Medicine, for examination and such treatment as the doctor should recommend. He was discharged by the doctor on January 8, 1943, and on January 9, 1943, Dr. Thomas submitted the following report to the Division of Highways :

"Patient's story of accident: Fell out of truck December 6, 1942, when driver started suddenly. Doesn't know how he landed. Small *of* back and hips sore. Nature *of* injury: **Posture** fair. Tends to a dorsum rotundum. Motions of spine good. Backward and to left

bending cause pain in left flank. Tender over left superior spine. Ecchymosis in left gluteal region. Reflexes all right. Blood pressure 200/70. Nothing apparent **or** palpable scalp. Complains of area over left posterior boss. Treatment: Heat and massage."

Mr. Muir returned to his employment with the Division of Highways on April 21, **1943**, and worked regularly thereafter until March 31, **1944**.

On the last-mentioned date, Mr. Muir was shoveling and broadcasting cinders from the rear of a Division truck and as they approached Stony Island Avenue and 95th Street from the West, and while being driven slowly through the intersection, scattering the cinders, Mr. Muir fell, violently, from the rear end of the truck **box**. He was taken by Chicago police ambulance to the South Chicago Community hospital, where he was pronounced dead by the resident physician.

Because of the suddenness of Mr. Muir's death, an autopsy was performed by Dr. Julian Dawson,, a coroner's physician, in Chicago. The following is a copy of Dr. Dawson's findings at the autopsy:

"PATHOLOGICAL REPORT

A. L. BRODIE, Coroner of Cook County—March 31, 1944.
Autopsy Revealed:

- (1) No evidences of Internal 'Injury.
- (2) Aortic (Valvular) Insufficiency of the Heart.
- (3) Aortic Aneurysm (Sacculation of the Aorta). (Massive.)
- (4) Coronary Trombosis and Occlusion.
- (5) Generalized Arterio-Sclerosis.
- (6) "Hour Glass" Stomach.

In my opinion the death of William J. Muir was due to the organic heart disease complicated by Coronary Occlusion and Aortic Aneurysm (*Natural Causes*)."

(Signed) JULIAN DAWSON, M. D.

On the hearing, the widow testified that when her husband was first employed by the State, he was in good

health, but that since December 6, 1942, after he fell from the truck, he constantly complained that he was feeling bad; that his breathing was difficult and left arm ached. That he did not complain of such symptoms prior to the accident, and he informed her that he was going to try to get lightêr work; that he could not stand that work any more; that it required quite an effort to lift the shovel and throw the ashes on the highway as he had been doing and the work was too heavy for him.

Edward Gebert was called as a witness on behalf of the respondent. He testified that he was the driver of the truck from which Mr. Muir fell on March 1, 1944, and that he had been acquainted with the deceased for about 20 years; that the deceased's health had been bad ever since he knew him. The following questions were propounded and answered: -

Q. What was the trouble with him?

A. Heart.

Q. Had he complained to you about that?

A. Oh, yes. Sure. I have been up to visit him time and time again when he couldn't work.

Q. Because of his heart?

A. Heart? Yes.

Dr. Lewis R. Limarzi, a graduate of the University of Illinois, was called as a witness. He testified that on December 16, 1942, he examined the deceased at his office. He testified that the patient complained that he had fallen from a truck on which he was shoveling cinders; that he had thereby suffered certain injuries.

His blood pressure was 170/60; his pulse was 88; he did not, at that time, complain about a cardiac condition; the heart was enlarged to the left, and there was a pre-cordial pulsation in the supraclavicular region. He had a systolic murmur over the aortic area, the liver and spleen were not palpable. The physician's impression,

at that time, was that Muir had an aortic lesion with hypertension. The doctor suggested an x-ray be made of the chest, electrocardiogram, and blood chemistry, and he made a notation on his record that the patient should do light work. He testified that he saw him again on January 7, 1943, his blood pressure was then 170/70 and pulse was regular. The doctor again insisted that the patient have an electrocardiogram and an x-ray of his chest made. He testified that he suggested these two tests because of his belief that the patient had an unhealthy or unnatural heart condition. He further testified that, in a patient such as Mr. Muir, having high blood pressure and a poor heart, he usually begins to decompensate, that is, he gets short of breath, his liver enlarges, his ankle swells, and he becomes bedridden; that was the reason the amount of work on the heart must be decreased. A question was propounded to Dr. Limarzi, which incorporated the findings of the coroner's report dated March 31, 1944, and his testimony regarding his examination of deceased. He answered that death was due because the patient performed overly hard physical labor in spite of his condition, as he had observed on the dates of his two examinations. He testified that exertion, with aortic aneurysm, such as he had observed on his examinations would cause lesion aortic, which produced his death. He further testified that he was sure that the effect of rather severe manual labor was a direct contributing cause of this patient's death; that he was not in a condition to do heavy work; that it definitely shortened his life.

It has been held on numerous occasions that when a person has a pre-existing disease and that disease is aggravated or accelerated in the course of his employment by accidental means and death results therefrom,

the death results from the injuries caused by the accident and is compensable. *Finkler vs. State*, **11 C. C. R. 55**.

In the case of *Carneror, Joyce, & Co. vs. Ind. Corn.* **324**, Ill. 497, it was held that where an employee of a road construction company dies of valvular heart trouble within five months after his left arm and foot had been crushed, under the wheels of a heavy road grader, a finding that the injury contributed to the employee's death is warranted where the evidence shows that, although the employee had a chronic heart trouble, he had always been able to work up to the time of his injury, although he made satisfactory recovery from the local injuries to his arm and foot. *Valier Coal Co. vs. Ind. Corn.*, **339** Ill. 458.

The Supreme Court has recently handed down a decision of *Marsh vs. Ind. Corn.*, **386** Ill. p. 11, in which it was said:

"It is well settled that the Workmen's Compensation Act is not limited in its application to healthy employees. Where one sustains an accidental injury which aggravates a diseased condition or where, in the performance of his duties and as a result thereof, he is suddenly disabled, an accidental injury is sustained even though the result would not have obtained had the employee been in normal health."

C. & A. Ry. Co. vs. Ind. Corn., 310 Ill. 502; *Hahan vs. Ind. Corn.*, **337** Ill. 39; *Simpson Co. vs. Ind. Corn.*, **337** Ill. 454.

In *Mueller Const. Co. vs. Ind. Corn.*, **283** Ill. 148, the Court said:

"An injury may be said to arise out of the employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under

this test, if the injury can be seen to have followed as a natural incident of the work and to have contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises out of the employment."

Vincennes Bridge Co. vs. Ind. Corn., 351 Ill. 444; *Mazursky vs. Ind. Corn.*, 364 Ill. 445; *Scholl vs. Ind. Corn.*, 366 Ill.

We conclude, therefore, that a careful consideration of this record justifies an award to claimant. We therefore make the following finding:

That the deceased and the respondent were on the 30th day of March, 1944, operating under the provisions of the Workmen's Compensation Act; that on the date last mentioned above said deceased sustained accidental injuries from which he died on the same date which did arise out of and in the course of his employment; that notice of said accident was given said respondent and claim for compensation on account thereof was made on said respondent within the time required under the provisions of said Act.

That the earnings of the deceased during the year next preceding the injury were \$1,232.00 and that the average weekly wage was \$23.69.

That deceased at time of injury was 68 years of age and had no children under 16 years of age, dependent upon him for support.

That the claimant is entitled to an award in the sum of \$4,700.00 to be paid as follows: \$13.92 per week for a period of 337 weeks with one final installment of \$8.96, as provided in Paragraphs (a) and (1) of Section 7 and Paragraph (m) of Section 8 of said Act, as amended, for the reason that the injuries sustained caused the death of William James Muir, who left him surviving Mae Muir, the widow, whom he was under legal obligations to

support under the provisions of the Workmen's Compensation Act. That nothing has been paid on account of said injury and death.

The said claimant is now entitled to have and receive from the respondent the sum of \$807.36, being the amount of compensation that has accrued to the 11th day of May, 1945. The remainder of said award to be paid to said claimant by said respondent in weekly payments, commencing one week from the date last above mentioned. This award is subject to the further orders of this Court.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3439—Claim denied.)

GLENN EWAN, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

opinion filed June 12, 1945.

SHARL B. BASS AND GREENBERG & SACHS, for claimant.

GEORGE F. BARRETT, Attorney General; GLENN F. TREVOR AND WILLIAM L. MORGAN, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim will be denied.* The burden is upon claimant to show that the alleged partial disability was caused by his illness from typhoid fever contracted while he was employed as an attendant at the Manteno State Hospital. Failure to sustain his claim bars an award.

FISHER, J.

It is agreed by stipulation herein that claimant, Glenn Ewan, was, on September 4, 1939, employed by respondent as an attendant at the Manteno State Hos-

pital, Manteno, Illinois; that on said date he became ill with typhoid fever; that he was hospitalized at the State Hospital; and that he returned to his former employment on November 16, 1939.

Claimant continued to work in the same capacity until May 1, 1940, about which date he resigned and returned to his home in Eldorado, Illinois.

Claimant seeks an award under the provisions of the Workmen's Compensation Act for temporary disability, for permanent partial impairment of hearing and vision, and medical costs and expenses incurred.

During the time of claimant's illness a typhoid epidemic existed at the Manteno State Hospital, and we have heretofore held that an employee of the Institution who became ill from typhoid fever under such circumstances was entitled to the benefits of the Workmen's Compensation Act.

The record in this case consists of the Claim, Stipulation, Medical Report at the time of the injury, Medical Report of an examination made January 13, 1945, Transcript of Evidence, and Statement, Brief and Argument by Claimant and Respondent.

The record shows that claimant was furnished hospital and medical care in the institution during his illness; that he was paid his full salary during the period of his illness; and that he sought no medical care of respondent after he returned to work on November 16, 1939. He gave no notice to respondent that further medical care was required. He selected his own doctors without notice to respondent, and, under Section 8 (a) of the Workmen's Compensation Act, he does so at his own expense.

Claimant alleges that he was unemployed for about a year after May 1, 1940, but there is nothing in the record to indicate that he was physically unable to work

or that his disability was connected with, or the result of, his illness from typhoid fever. He testified that during this time he was treated for "aches and pains" and "for deficient thyroid gland."

Dr. Alfred H. Hermann of 30 North Michigan Avenue, Chicago, Illinois, testified that he examined claimant on or about December 31, 1944, and found the vision impaired in the right eye and the hearing impaired about 10% in the left ear. Dr. Hermann, when asked if there was a causal connection between claimant's condition as found then and the typhoid fever that claimant had contracted, answered "there could be." Again asked if, in his opinion, there would be, he answered "there might or could be." The burden is upon the claimant to show that his partial disability was caused by his illness from typhoid fever. This he has not done. From the entire record, we are unable to find any basis for an award in this claim.

Award is denied.

(No. 3578—Claimant awarded \$181.17.)

RONALD J. VADEBONCOEUR, Claimant, *vs.* STATE OF ILLINOIS,
Respondent.

Opinion filed June 12, 1945.

SHAPIRO & LAURIDSEN, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made thereunder.* Where it appears that claimant while an attendant at Manteno State Hospital, was required to use lysol for sterilizing instruments in the hospital and subsequently became afflicted with a skin infection, it is an accidental injury within the meaning of the Act and is compensable. An accidental injury is one which occurs in the course of employment unexpectedly and without the affirmative act or design of the employee. The word "accident" is not to be technically construed.

It may comprehend any event which is unforeseen and not expected by the person to whom it happens. The act of sterilizing with lysol by claimant was expected and was in itself no accident. The infection was not expected and is traceable to the act of using lysol and is compensable.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint was filed on January 16, 1941, for an alleged injury suffered by claimant during the course of his employment for the State.

The record consists of the complaint, stipulation, testimony, report of the managing officer of Manteno State Hospital, report of Dr. L. L. Bell, St. Anne, Illinois, waiver of brief and argument on behalf of claimant and respondent.

The record discloses that on the 25th day of July, 1940, the claimant was an attendant at the Manteno State Hospital and had been for some time prior thereto. He was being paid a salary of \$871.20 per year plus room and board. It is stipulated that at the time of the alleged illness, the claimant was the father of two dependent children under the age of sixteen years.

This record further discloses that claimant's duties at the Manteno State Hospital required him to use lysol for sterilizing instruments in the hospital, and on the 25th day of July, 1940, the skin of his body began to "break out." Claimant reported his condition to Dr. Chrysler, of the institution, who referred him to Dr. Steinberg, a member of the staff. Claimant testified that the last-named doctor prescribed a calomine lotion to be applied to his body and that the lotion failed to give him relief. He then employed Dr. L. L. Bell, St. Anne, Illinois, who treated him for dermatitis until October 10, 1940.

Dr. Bell discharged the claimant on said date, from further treatment, and the claimant reported back to the institution on the 14th day of October, 1940, for work.

The claimant presents two exhibits, showing expenditures made by him in his effort to be relieved from this skin infection: To Dr. L. L. Bell \$10.00; for medicines **\$9.47.**

The report of the managing officer at Manteno State Hospital states that the institution's record fails to disclose any injury that this claimant may have sustained during the course of his employment, and there is no record of any form of treatment given to this claimant at the hospital by any of the staff physicians.

The record discloses that claimant returned to work on October 14, 1940, and presented a certificate from Dr. L. L. Bell, in which he states that the claimant had been discharged by him from further treatment for a dermatitis which he believed may have been the result of handling lysol solution.

An accidental injury, within the meaning of the Workmen's Compensation Act, is one which occurs in the course of the employment unexpectedly and without the affirmative act or design of the employee. The word "accident" is not to be technically construed. It may comprehend any event which is unforeseen and not expected by the person to whom it happens. The act of sterilizing with lysol by claimant was expected and was in itself not an accident. The infection was not expected and is traceable to the act of using lysol and is compensable.

After a full consideration of this record, the court finds that the claimant and respondent were, on the 25th day of July, 1940, operating under the provisions of the Workmen's Compensation Act; that on the date last

above mentioned said claimant sustained accidental injuries which did arise out of and in the course of the employment; that notice of said accident was given said respondent and claim for compensation on account thereof was made on said respondent within the time required under the provisions of said Act. That the earnings of claimant next preceding the injury were \$1,159.20, and that the average weekly wage was \$22.29. That the claimant at the time of the injury had two children under sixteen years of age.

Under Section 8, paragraph (a) of the Act, claimant is entitled to have such medical care as is reasonably required to relieve him of the effects of his injury. It appears from the record that the services claimed were necessary and that the charges therefor were reasonable and just. The record further discloses he was not able to work for a period of eleven weeks after said injury.

An award is therefore made in favor of the claimant in the sum of \$161.70 for temporary total compensation from the 25th day of July, 1940, until October 10, 1940, at \$14.70 per week and for the sum of \$19.47 for doctor bill and medicines expended by claimant during that period in order to relieve his condition of ill-being, making a total award in the sum of \$181.17, all of which has accrued and is payable in a lump sum.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3678—Claimant awarded \$350.67.)

JAMES V. SHEPLEY, D. B. A. SHEPLEY MOTOR EXPRESS, Claimant,
vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

HUTCHINSON AND BARNES, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

SERVICES—*lapse of appropriation before payment—sufficient unexpended balance in—where award may be made for value of.* Where services are sold to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there were sufficient funds remaining therein to pay same.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

The complaint in this case alleges that the claimant is the owner of the Shepley Motor Express, a trucking and hauling business, located at 2 North Des Plaines Street, Joliet, Illinois, and has been engaged in said business for the past 10 years or more.

That during this time the Shepley Motor Express has done trucking for the State of Illinois, respondent herein, from the State Penitentiary at Joliet and Stateville, hauling to various other state departments and agencies as set out in items in the bill of particulars attached to the complaint.

The complaint further alleges that between September 4, 1937, and December 9, 1941, the claimant, at the request of various agencies of the respondent hauled merchandise which was manufactured in the two above named institutions to the various consignees, whose

names and addresses are contained in the said bill of particulars. It further alleges that each consignee had been billed for the services rendered by the claimant, and that said accounts were not paid for the reason that the appropriations from which the accounts could have been paid had lapsed at the time the demand was made by the claimant upon the various consignees.

This record consists of the complaint which was filed on the 12th day of January, **1942**, bill of particulars attached thereto, testimony in support of said claims, waiver of brief, and arguments on behalf of claimant and respondent.

The evidence filed in this case supports the allegations of the complaint that the services rendered to the respondent by the claimant from September **4, 1937**, to the 8th day of December, **1941**, amounted to the sum of **\$388.90**. The evidence further discloses that part of this account has been paid by some of the agencies of the respondent, and that there is now due and owing to claimant the sum of **\$350.67**.

The invoices and bill of particulars show that fair and reasonable charges were made by the claimant for the services rendered to the various agencies of the respondent.

This court has heretofore held that where one renders services to the state on the order of one authorized to contract for same, and submits a bill therefor in correct amount within a reasonable time, and due to no fault or negligence of claimant, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award for the reasonable value for the services rendered may be made; *The Catholic Bishop of Chicago, et al, vs. State*, **12 C. C. R. 340**; *Rock Island Sand & Gravel Company vs. State*, **8 C.**

C. R. 165; *Oak Park Hospital Inc. vs. State*, 11 C. C. R. '219.

This case comes within the rule above set forth. An award is therefore entered in favor of the claimant, James B. Shepley d.b.a., Shepley Motor Express, in the sum of \$350.67.

(No. 3816—Claimant awarded \$773.58.)

BEN GOLD, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

WHITE & WHITE, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employee of Illinois Industrial Home for Blind within provisions of—wheat award may be made under.* Where it appears that claimant sustained an injury, out of and in the course of his employment, an award may be made for compensation for care reasonably required to relieve him of the effects of the injury, in accordance with the provisions of the Workmen's Compensation Act upon compliance by employee with the requirements thereof.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

At the March term, 1945, this court had under consideration a complaint filed in the above entitled cause, seeking an award under the Workmen's Compensation Act, for permanent partial loss of use of claimant's right leg, due to an injury sustained by him in the course of his employment for respondent, at the Illinois Industrial Home for the Blind, 1800 Marshall Boulevard, Chicago, Illinois. He also sought an award for approximately \$600.00 which he claimed to have paid for hospitalization and medical services on account of said injury.

After a full consideration of the record, we found that we were unable to determine the amount of the

award, if any due to claimant. No bill of particulars was filed as required by Rule 6 (a) of this court. We held that the proof offered was insufficient for determination of any award, retained jurisdiction, and ordered that the claimant be given thirty days in which to offer additional proof in support of his claim.

On the 13th day of April, 1945, additional testimony was taken in support of said claim. Dr. Robert Elliot, Loyola University, with offices at 3559 North Ashland Avenue, Chicago, was called to testify on behalf of claimant. His qualification as an industrial surgeon was admitted by the respondent. He testified that he examined the claimant on the 10th day of October, 1944, for the purpose of testifying in the case as an expert witness. He testified that objectively he found the right ankle was swollen; claimant had a limping gate, there was some loss of functional use of the ankle joint, and the objective findings were permanent. The claimant was called to testify in his behalf, and in response to a question he answered that his right limb was weaker than before the injury, he had a decided limp when he walked, and that he suffered constant pain, especially during the change of weather.

During the course of the hearing, six exhibits were introduced and admitted in evidence by agreement, representing expenditures made by claimant in his effort to be relieved from the effects of the injury sustained as aforesaid and are as follows: Dr. Charles M. Jacobs \$200.00; St. Anthony Hospital \$6.70; Mt. Sinai Hospital **\$312.02**; Dr. Urbanek \$5.00; Mt. Sinai Hospital **\$3.75**; Mt. Sinai Hospital \$5.00; Total \$532.47.

- It is stipulated that the injury sustained by the claimant on the 18th day of January, 1943, arose out of and in the course of his employment with the respond-

ent; that the claimant notified the respondent of the accident within 30 days and claim for compensation was made within six months as required by the Act; that the annual wage of the claimant for the year preceding the date of the accident was \$1,200; that medical treatment on account of said accident was partially furnished by the respondent and the claimant was paid all temporary disability compensation and had no children under the age of sixteen years dependent upon him for support.

The record discloses that the respondent furnished only partial medical and hospital services. Under Section 8 (a) of the Workmen's Compensation Act, claimant is entitled to have such care as is reasonably required to relieve him of the effects of the injury. It appears from the record that the services claimed were necessary and that the charges therefor were reasonable and just.

Claimant's annual wage being \$1,200.00, his weekly wage is \$23.07 and his compensation rate is \$12.69.

From a consideration of the additional testimony, we make the following award:

The sum of **\$532.47** representing expenditures by claimant for necessary hospitalization, medicines, etc. The evidence in this case justifies a ten per cent award **for** the permanent partial loss of use of claimant's right leg, amounting to the sum of \$241.11, making a total award of \$773.58, all of which has accrued and is payable in a lump sum.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees. ,!

(No. 3823—Claimant awarded \$15.13.)

STANDARD OIL COMPANY (INDIANA), Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion. filed June 12, 1945.

Claimant, pro se.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

SUPPLIES—lapse of appropriation before payment—sufficient unexpended balance in— when award may be made for value of. Where merchandise is sold to the State, on its order, and received by it and claimant submits a bill in the correct amount therefor within a reasonable time, and due to no fault or negligence on his part, same is not approved and vouchered for payment before lapse of appropriation from which it is payable, an award may be made for the value thereof, where at the time same was furnished there were sufficient funds remaining therein to pay same.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

The claimant is a foreign corporation duly authorized to engage in business in the State of Illinois. An award in the amount of \$18.11 is sought for goods sold and delivered to the respondent by the claimant.

The record consists of the complaint, the report of the Division of Highways and the waiver of statement, brief and argument by both claimant and respondent.

The record discloses that the claimant through its agents furnished the respondent with the following items: On April 12, 1943, 16 gallons gasoline priced at \$2.98, on May 27, 1943, 20 gallons gasoline priced at \$3.50, on May 22, 1943, 15 gallons gasoline priced at \$2.62, on May 27, 1943, 35 gallons of Perfection Oil priced at \$4.39, on May 17, 1943, 10 gallons gasoline and one quart of Polarine Oil priced at \$2.00, and on May 13, 1943, 15 gallons gasoline priced at \$2.62. The total charge for the above items is \$18.11.

The report of the Division of Highways acknowledged receipt of the supplies, that they were used in the equipment designated in the exhibits, that the quantities were correct and that the amounts charged were as previously agreed between the Division and the claimant's dealers. The report further shows that the item of 16 gallons of gasoline delivered on April 12, 1943, for which the charge of \$2.98 was made was paid by the Division of Police on June 15, 1943. The payment of this item has been acknowledged by the claimant which leaves the amount of \$15.13 unpaid.

It further appears from the record that an appropriation existed from which the above items were payable, but that payment was not made because the appropriation lapsed before the bills were approved and vouchered. It has been repeatedly held by this court that an award may be made for supplies furnished the State when an unexpended appropriation therefor has lapsed preventing payment; and when the bills have been presented within a reasonable time.

An award is, therefore, made to the claimant in the amount of \$15.13.

(Nos. 3847, 3848 and 3849 Consolidated—Claimant Marie McAsey
awarded \$5,306.00.)

MARIE McASEY, ADMINISTRATRIX OF THE ESTATE OF EDWARD J. McASEY, DECEASED, CARL F. JESSE AND JAMES R. CARPENTER, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

PENCE B. ORR, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L. MORGAN AND C. ARTHUR NEBEL, Assistant Attorneys General, for respondent.

WORKMEN'S COMPENSATION ACT—*Guards at Illinois State Penitentiary within provisions of—when award may be made.* Where it appears that claimant was in good health prior to the accident and that he sustained severe injuries while attempting to prevent a prison break, while in the performance of his duties as a guard at the Illinois State Penitentiary, and the medical testimony discloses that the injuries received did cause or at any rate aggravate the condition from which he subsequently died, his death was the result of injuries sustained during the course and within the scope of his employment and an award may be made therefor in accordance with the provisions of the Workmen's Compensation Act.

SAME—degree and extent of injuries. In order to be entitled to an award, it is incumbent upon claimants to establish by competent evidence the exact extent and degree of the injuries complained of and for which compensation is sought.

FISHER, J.

Edward J. McAsey, Carl F. Jesse and James R. Carpenter were injured in the course and within the scope of their employment as Guards at the Illinois State Penitentiary, Joliet Branch, on May 4, 1943. Claims were separately filed on May 1, 1944, and, for the purpose of hearing and determination were, by stipulation, consolidated.

Claimant, Edward J. McAsey, died intestate on December 26, 1944, and, by order of this Court, Marie McAsey, Administratrix of the Estate of Edward J. McAsey, Deceased, was substituted as claimant.

On the morning of May 4, 1943, two prisoners attempted an escape from the Joliet Penitentiary (Old Prison) and, in the attempt, viciously assaulted Edward J. McAsey, Carl F. Jesse and James R. Carpenter, all of whom, in preventing the escape, were severely injured. The facts are not denied and no question arises as to the jurisdiction of the Court of Claims. Respondent agrees that "the only question to be considered by the Court is the extent and the permanency, if any, of the injury to the claimants."

Claimants and respondent were operating under the provisions of the Workmen's Compensation Act, and the claimants are entitled to the benefits provided by this Act.

The record of these claims consists of the following:

Copy of Complaint in each case.
 Stipulation to Consolidate.
 Departmental Report.
 Original Transcript of Evidence.
 Abstract of Evidence.
 Exhibit No. 1 in Case No. 3847.
 X-ray Exhibits Nos. 1, 2 and 3 in Case No. 3849.
 Statement, Brief and Argument of Claimants.
 Suggestion of death of Claimant, Edward J. McAsey, in Case No. 3847.
 Copy of Death Certificate and Letters of Administration.
 Statement, Brief and Argument of Respondent.
 Reply Brief of Claimants.
 Amendment to Complaint in Case No. 3847.
 Waiver of Respondent's Answer to Claimants Reply Brief.
 Answer of Respondent to Claimants Amended Complaint in Case No. 3847.

At the time of the injury, Edward J. McAsey did not appear to be seriously injured. He was not hospitalized. He had been struck, knocked down and kicked about the body by one of the prisoners. A short time later he complained of pains in his back; a lump developed in his right side; and he lost considerable weight. He called Dr. Charles J. Carlin of Joliet, Illinois, in July, 1943, who, after an examination, recommended surgery. Mr. McAsey was taken to Hines Veterans Hospital, where his right kidney was removed and found to be cancerous. He died on December 26, 1944, from "metastatic carcinoma of right kidney." He was in good health prior to the injury on May 4, 1943. Dr. Carlin testified that if the injury that Mr. McAsey had received did not actually cause the condition from which he died it did aggravate the condition and hasten his death. Also, on cross exam-

ination, Dr. Carlin testified "in my opinion the injury which Mr. McAsey received during the riot may have been the cause of the cancer, or, if not the cause, it is my opinion that the injury aggravated his condition and did shorten his life for a number of years." Such an injury falls within the provisions of the Workmen's Compensation Act, and is compensable. *Finkler vs. State*, 11 C. C. R. 55; *Marsh vs. Industrial Commission*, 386 Ill. 11.

There is much evidence as to the injury of Mr. McAsey, the cause and effect, and from all the evidence we conclude and find that Mr. McAsey came to his death as a result of injuries sustained during the course and within the scope of his employment. At the time of his death he left his wife, him surviving, and two children under the age of 16 years, dependent upon him for support. The deceased, to relieve from his injury, during his lifetime advanced \$26.00 for medical services, for which sum his estate is entitled to be reimbursed. The average weekly wage of decedent during his lifetime was \$38.37 per week.

An award, in accordance with the provisions of the Workmen's Compensation Act, will be entered in favor of Marie McAsey, for herself and for the benefit of her two children.

Claimant, Carl F. Jesse, is married and has three children under 16 years of age dependent upon him for support at the time of the injury. He seeks an award for serious and permanent disfigurement to his head and face and for permanent disability. He was hospitalized at the time of the injury and all hospital and medical expenses were paid by respondent. He suffered no loss in salary and now earns as much and more than he did during the injury. Under the Workmen's Compensation Act, no award can be made to him for temporary or

permanent disability. There is no doubt that Mr. Jesse was severely beaten about the face and head. His injuries, however, to be compensable, must fall within some provision of the Workmen's Compensation Act. There is testimony that his vision has become impaired as a result of the injury, but the evidence is insufficient upon which to base an award. The degree of impairment to his vision is not shown. The burden is upon the claimant to make proper proof of his claim, and in the 'absence of proof showing the degree that his vision has been impaired, we cannot grant an award. There is also much testimony as to the disfigurement to his face; the nasal bone and frontal bone on the right side of his face were fractured, as well as the septum, which was severely shattered inside. It was testified that "his nose was spread all over his face." Disfigurement is a matter of appearance, and deformity as it appears after medical attention and treatment, must be described in some detail in order that just and fair compensation *might* be determined. There is evidence that his nose is deformed, but we are unable to determine the extent of this deformity. On the evidence before us, we cannot grant an award for disfigurement. However, we retain jurisdiction of this claim for such further evidence and consideration as may be proper.

For the reason stated, the claim of Carl F. Jesse must be denied.

Claimant, James R. Carpenter, is married and had one child under the age of 16 years at the time of his injury. He seeks an award for injuries to his head and face, for partial loss of vision and for disfigurement. Claimant was struck about the head and face with a hammer by one of the prisoners, fracturing claimant's jaw and inflicting other serious and painful injuries to

his head and face. He was paid his salary during his temporary disability, and thereafter returned to his former position at the same salary. There is no claim for temporary or permanent disability. Dr. Howard N. Flexer testified for claimant as follows :

“* * * James R. (Carpenter sustained a compound fracture of the left cheek bone, the fracture being both of the depressed type and linear. The linear fracture extended from the second molar tooth on the left side, upper, up to and into the left lower side of external orbital fossa wall. The depressed fracture was just below the orbit on the left side, in the anterior surface of the malar bone. His injuries caused him hemorrhage into the posterior orbit, causing double vision for about one month, and then single vision only after eye strain for another month. He had too, severe subconjunctival hemorrhage of left eye from the force of the blow * * *”

From the evidence, it appears that James R. Carpenter sustained no injuries that are compensable under the Workmen's Compensation Act, except possible impairment of his vision and such dental charges as may be necessary to relieve him from the effects of his injury. He testified that he paid some dental charges of a proximately \$45.00, and Dr. Eugene J. Drenning testified that some teeth must be pulled and replacements made that will cost about \$200.00. In order to recover medical and dental charges, claimant must show the exact amount of the costs or charges, and the same must be shown to be reasonable. It is not sufficient to approximate the amount of such costs or charges that are necessary to relieve from the effects of an injury. There is evidence that claimant's vision has become impaired, but the degree of impairment is not shown. Under the evidence, no award can be made to claimant, James R. Carpenter. It is evident, however, that he has sustained some compensable damages, the exact amount of which we cannot determine from the evidence, and jurisdiction

of this claim is, therefore, retained for such further consideration as additional evidence may require.

The claim of Carl F. Jesse is denied.

The claim of James R. Carpenter is denied.

Under the Workmen's Compensation Act, Section 7, paragraphs H3-K-G, claimant, Marie McAsey, is entitled for herself and on behalf of her minor children, to have and receive from respondent the sum of \$5,280.00, plus advancements of \$26.00 for medical expenses, making a total of \$5,306.00.

An award is therefore entered in favor of claimant, Marie McAsey, in the sum of \$5,306.00, payable as follows :

\$448.40, which is accrued up to June 12, 1945, and is payable forthwith;

\$4,857.60, payable in weekly payments of \$17.60 each, beginning June 19, 1945.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3855—Claimant awarded \$1,350.00.)

HARRY J. FLANDERS, Claimant, vs. **STATE OF ILLINOIS**,
Respondent.

Opinion filed June 12, 1945.

JOHN W. FRIBLEY, for claimant.

GEORGE F. BARRETT, Attorney General; **C. ARTHUR NEBEL**, Assistant Attorney General, for respondent.

FEES AND SALARIES—*Salaries of City Judges—how fixed—State auditor cannot use census figures to decrease salary of judge during term for which he was elected. Where it appears that a City Court has been duly established in accordance with the provisions of Section 21, and the salary fixed in accordance with Section 23 of "An Act in Rela-*

tion to Courts of Record in Cities". (Chapter 37, Illinois Revised Statutes) a judge elected to such Court is entitled to receive his full salary during the term of office for which he was elected. A subsequent decrease in the population during his term of office, cannot be used for the purpose of decreasing his salary or eliminating the Court during the term of office for which he was elected.

FISHER, J.

Claimant asks for an award in the sum of \$1,350.00, being his salary as a Judge of the City Court of the City of Eldorado, Illinois, for the months of July, August, September, October, November and December of 1941 and January, February and March of 1942, at \$150.00 per month.

The material facts in this case, as alleged in the complaint, are admitted by stipulation.

The record consists of the Complaint, Answer, Stipulation, and Statement, Brief and Argument by claimant and respondent.

Claimant is a duly elected Judge of the City Court of the City of Eldorado, Illinois, having been elected to that office in 1933 for a term of six years, and re-elected on October 3, 1939, for a term of six years, and is now, and has been since his first election the duly elected, qualified and acting Judge of the said City Court of the City of Eldorado, Illinois.

The compensation or salary of a Judge of a duly established City Court is fixed by Section 23 of "An Act In Relation to Courts of Record in Cities," as amended, and fixes the salaries of Judges of City Courts having a population of at least 5,000 and not less than 8,000 at the sum of \$1,800.00 per annum, payable from the Treasury of the State of Illinois. In cities having less than 5,000 inhabitants and not less than 3,000 inhabitants, the compensation or salary is **fixed** at \$800.00, payable out of the City Treasury.

The 62nd General Assembly of the State of Illinois made an appropriation for the payment of salaries of Judges of City Courts of the State of Illinois during the biennium period from July 1, 1941, to June 30, 1943, and authorized and directed the Auditor of Public Accounts to draw warrants on the State Treasurer for amounts due Judges of City Courts as salaries for their respective offices.

The question that presents itself for determination here is—

Was the State Auditor justified in using the latest available census to reclassify and determine the class in the graduated scale into which each City Judge fell after such Judge had been elected, or was he required to use a census before each Judge was elected?

Section 23 of "An Act In Relation to Courts of Record in Cities" (Ch. 37 Illinois Revised Statutes), provides that in cities having a population of over 5,000 inhabitants and not less than 8,000 the salary shall be \$1,800.00 per year, and in cities having a population in excess of 8,000 and not exceeding 15,000 the sum of \$2,250.00 per year, and in cities having a population of more than 15,000 a graduated scale of compensation based upon the population of the city. It is the application of this section that must be determined here. It seems to have been the practice of the Auditor of Public Accounts to reclassify Judges of City Courts according to the latest available census. Respondent contends that the Auditor of Public Accounts is required to do this in order to comply with said Section 23.

Claimant contends that the salary, or rate of compensation for a Judge of a City Court, is determined at the time of his election and is not subject, during his term of office, to revision according to population changes. This Section (23), makes no reference to the

taking of a census, but merely provides the salary of a Judge having been elected to office and bases the salary on the population of such city. However, Section 21 of the same Act, provides for the establishment of City Courts in cities having at least 3,000 inhabitants whenever the City or Common Council shall adopt an ordinance and such ordinance be subsequently approved by the voters of such city. It further provides, that such Court may be established consisting of one or more Judges, not exceeding five, and not exceeding one for each 50,000 inhabitants. It further provides that "the number of inhabitants shall be determined by reference to the Federal census, or a census taken by the city authorities."

. The exact question presented here for determination does not appear to have been passed upon by the Courts of this State.

. The respondent presents a forceful and exhaustive brief and argument, contending that said Section 23 requires the Auditor of Public Accounts to adjust the salaries of Judges of City Courts in accordance with the last available census, and reasons that under Section-21 the Auditor could use the Federal census to the exclusion of any other census in determining the population of a city and the resulting salary of a Judge of the City Court. In the present case it is admitted that a Federal census was taken in 1930, prior to the election of claimant herein, and again in 1940, both of which showed the population of Eldorado City to be less than 5,000, and that a census was taken by the City authorities in 1933, and again in 1942, both of which showed the population to be in excess of 5,000 inhabitants. As the Statute referred to related to a "Federal census, or a census taken by the City authorities," it could be as logically reasoned

that the Auditor of Public Accounts could take the census taken by City authorities to the exclusion of a Federal census. During all the time that claimant held the office of Judge of the City Court of Eldorado City the population was in excess of 5,000, as disclosed by a census taken by the City authorities ; a census was taken in 1933, and again in 1942, both of which showed the population to be in excess of 5,000.

A Federal census was taken in 1930, and again in 1940, showing the population to be less than 5,000 inhabitants. It does not appear reasonable to us that the Legislature ever intended that the State Auditor of Public Accounts should have the discretion of determining what the salary or compensation of a Judge of a City Court should be. In a borderline case, a census ~~taken~~ by the Federal authorities and a census taken by the City authorities could, very reasonably, vary to the extent that by using one or the other it would increase or decrease the salary of a Judge who had been elected prior to the taking of such census. To protect himself, the Auditor, it appears, has used the latest census in determining salaries to be paid. This practice can, and has in this case, resulted in confusion. In this particular case, at the time claimant was elected there was in existence the result of a Federal census showing a population of less than 5,000, and a later census taken by the City authorities showing a population in excess of 5,000 inhabitants. His salary at the time of his election was, thereupon, properly fixed at \$150.00 per month, the salary for such office in cities having a population in excess of 5,000 and less than 8,000. Shortly after his reelection, a Federal census was taken, showing the population to be 4,987, and the payment of his salary was, thereupon, discontinued by the State Auditor. Less than

two years thereafter, a census was taken by the City authorities, showing the population to be 5,190, and his salary was, thereupon, re-established, and the Auditor of Public-Accounts thereafter issued warrants in the regular manner.

We think this confusion would be eliminated by construing the said Sections 21 and 23 of the Statute as: Section 21 providing for the establishment of City Courts and election of such number of Judges as authorized by this section in accordance with the population as disclosed by the latest census that has been taken. Upon such election, the salary of the Judge or Judges is, thereupon, established in accordance with Section 23 of the Statute, and such salary should be continued during the term for which such Judge or Judges had been elected. This construction is supported by Section 21, which provides that a City can discontinue and disestablish such Court in the same manner by which it is established, but such Court once having been established a discontinuance or disestablishment shall not take effect until at the expiration of the term of office of the Judge of said Court.' If it was intended that the compensation or salary of a Judge would fluctuate according to the population disclosed by a census taken from time to time during the term of office of a Judge, then the provisions against discontinuing the Court, effective during the term of a Judge elected thereto, would be meaningless, as a decrease in population would eliminate the salary of the incumbent Judge, and the office, to all intents and purposes, would thereby be eliminated. It surely was not the intention when a provision was made limiting the effective date of discontinuing a Court, that the salary should be eliminated and the Judge continue to serve without compensation. It does not seem reasonable to

believe that the Legislature ever intended to, or would, specifically prohibit the discontinuance of a Court during the term of a Judge elected thereto and, at the same time, direct the payment of the salary of such Judge to be discontinued -during his term of office. It would rather seem to have been the purpose that a Court be created in accordance with said Section 21, and, upon such creation, a salary be paid to the Judge or Judges in accordance with the provisions of Section 23 of the Statute, and thereafter continue during the term of office for which such Judge or Judges have been elected.

The City Court of Eldorado City having been duly established in accordance with the provisions of Section 21 of the Statute above referred to, and the salary fixed in accordance with Section 23 at the time of his election, it is our opinion that he was entitled to receive this salary during his term of office. He is, therefore, entitled to payment of his salary which has been withheld.

. An award is therefore entered in favor of claimant, Harry J. Flanders, in the sum of Thirteen Hundred Fifty Dollars (\$1,350.00).

(No. 3864—Claim denied.)

GEORGE ELLIOTT, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

C. A. WILLIAMS, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when claim will be denied.* Where it appears that claimant may have sustained some injury arising out of and in the course of his employment, but the exact nature of the injury has not been clearly established and it is extremely doubtful that any disability exists as a result of said injury—an award will be denied. Liability under the Workmen's Compensation Act cannot rest

upon imagination, speculation or conjecture, or on a choice between two views equally compatible with the evidence, but must be based upon facts established by a preponderance of the evidence.

ECKERT, J.

On July 21, 1943, the claimant, George Elliott, an employee of the Department of Public Works and Buildings, Division of Highways, of the State of Illinois, while loading trucks with rocks and broken concrete pavement suffered a severe pain in his left side and back. He finished his day's work and reported for work the following morning. He then, complained of pain and nausea, and was sent to Dr. R. B. Boyd, at Casey, for examination and treatment. Dr. Boyd taped his abdomen and suggested that he continue with light work and report for further observation. Dr. Boyd subsequently advised the Division that claimant had sustained an injury to internal muscles of upper left quadrant.

Claimant's pain continued and on July 24th he was placed under the care of Dr. C. C. Holman of the Effingham Clinic at Effingham, Illinois. Dr. Holman reported to the Division that claimant had sustained considerable kidney damage and was passing blood; that there was soreness in his back and abdomen, and prescribed rest, medication and ice packs. He indicated that the claimant would be able to return to work in about a month's time.

On August 5, 1943, claimant was discharged by Dr. Holman with the recommendation that he rest at home for a week and then return to Dr. Boyd for further examination. The urinary findings had completely disappeared, and Dr. Holman reported that claimant was on his way to complete recovery. He stated that no permanent disability was anticipated.

On August 24, 1943, Dr. Boyd reported that claimant was still very sore in the abdomen and when on his feet complained of nausea and pain on his left side. He further stated that on examination he found the left inguinal ring very sensitive and bulging on coughing. Dr. Boyd's diagnosis at that time was left inguinal hernia.

On August 31, 1943, the claimant was taken to Dr. J. Albert Key, Professor of Orthopedics, Washington University School of Medicine, at St. Louis, Missouri, for examination and treatment. He was also examined in St. Louis by Dr. Nathan A. Womack, Assistant Professor of Clinical Surgery at the Washington University School of Medicine. Dr. Key reported that the claimant was a heavy man who localized his pain in the left upper lumbar region and in the left groin; that there was moderate tenderness to deep pressure over the muscles to the left of the lumbar spine opposite the 1st, 2nd, and 3rd lumbar vertebrae; that there was tenderness of the left inguinal ring, and that an impulse was transmitted, but that there was no definite hernia. He found that the same condition existed in the right inguinal ring, except that it was not tender. Dr. Key felt the symptoms would subside gradually, but if they persisted, suggested that he see the claimant in about six weeks' time. Dr. Womack also reported to the Division that he found a strain of abdominal muscle for which he prescribed further rest.

Claimant, however, continued to complain of his discomfort, and was again sent to St. Louis on September 23, 1943, for further examination. Dr. Key then reported that he found no evidence of an abdominal wall hernia or inguinal hernia. He advised claimant to return to light work, and to obtain an abdominal support, stating that no other treatment was necessary.

Claimant, however, alleges in his complaint that he has suffered a hernia of the abdominal wall; that the hernia is of recent origin; that it was accompanied by pain; that it was immediately preceded by trauma arising out of and in the course of his employment with respondent, and that the hernia did not exist prior to the injury. He alleges that he has been totally and permanently disabled since the injury; that he will remain totally and permanently disabled for the remainder of his life, and seeks an award of \$15,000.00.

At the time of the alleged injury, claimant was married, but had no children under sixteen years of age dependent upon him for support. He had been employed by the Division of Highways since June 22, 1943, as a truck driver at a wage of 80¢ an hour. Employees engaged in the same capacity as claimant worked for the Division less than 200 days a year, and eight hours constituted a normal working day. At the time of the alleged injury, employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. Compensation for temporary total disability was paid claimant for the period from July 24, 1943, to September 23, 1943, inclusive, at the rate of \$17.63 per week, or a total of \$156.15. The Division also paid the following accounts in connection with claimant's injury:

Dr. Ryne B. Boyd, Casey.....	\$10.00
The Effingham Clinic, Effingham.....	26.00
Dr. J. Albert Key, St. Louis, Mo.. ..	20.00
Dr. Nathan A. Womack, St. Louis, Mo.. ..	10.00
St. Anthony's Hospital, Effingham.	41.20
Drs. Rhodes & Massie, Toledo.....	6.75
George Elliott, Greenup.....	10.58
Total	\$124.53

From the record it appears that the claimant sustained an injury arising out of and in the course of his employment. The medical testimony as to claimant's resulting disability, however, is in sharp conflict. The claimant testified to a continuing condition of soreness, and increased pain upon activity. Dr. W. R. Rhodes, of Toledo, Illinois, testifying in behalf of claimant, stated that in May, 1943, claimant was in good physical condition. Dr. Rhodes examined claimant after he returned from treatment in St. Louis. At that time he stated that he found an open ring in the left side, and that the muscles were pulled apart; that there was a bulging on the left side, and that the muscle tone was poor. Dr. Rhodes also stated that he had examined claimant a second time prior to the hearing on October 31, 1944, and that he felt there was a destruction of muscle tissue. On cross-examination, the doctor stated that he had not diagnosed claimant's difficulty as an inguinal hernia on either side, but had diagnosed the condition as an enlargement of the rings, a giving away of the muscles; in other words, an incomplete hernia. He stated that claimant could work if the work did not require lifting or undue strain, or standing; that claimant could drive an automobile, but he did not recommend his driving a truck.

Dr. R. B. Boyd of Casey, Illinois, also testified on behalf of claimant, and stated that at the time of his original examination immediately following the injury, he found pain in the upper right quadrant of claimant's abdomen; that he diagnosed the condition as an hernia, a break through the abdominal wall high up; that he still believes that claimant does not have an inguinal hernia. Dr. Boyd also stated that claimant could not do heavy

manual labor, but that with proper support he could work if the work did not require heavy lifting.

The medical proof on behalf of the respondent is contained in the reports to the Division of Highways, which are a part of the record in the case. From these reports it appears that claimant has not suffered an hernia of any type, and has been able to work, since September 23, 1943.

It is the duty of this court to weigh and consider the evidence in the record and if it is found that the evidence fails to support the averments in the complaint, the court must deny the claim. Liability under the Compensation Act can not rest upon imagination, speculation, or conjecture, or on a choice between two views equally compatible with the evidence, but must be based upon facts established by a preponderance of the evidence. *Berry vs. Industrial Commission*, 335 Ill. 374. Awards for compensation can not be based upon possibilities or probabilities, but must be based upon evidence the preponderance of which shows that claimant has incurred a disability arising out of and in the course of his employment. *Standard Oil Company vs. Industrial Commission*, 322 Ill. 524; *Weimer vs. State*, 12 C. C. R. 244.

From the evidence there can be no doubt that claimant sustained an injury arising out of and in the course of his employment. The exact nature of this injury, however, is not clearly established, and it is extremely doubtful that any disability now exists as a result of the injury.

Dr. Rhodes diagnosed claimant's condition as an incomplete inguinal hernia. Dr. Boyd stated positively that claimant had no inguinal hernia, but diagnosed claimant's disability as a break high up in the abdominal wall. Dr. Holman found no hernia, and anticipated no

permanent disability. Dr. Key found no definite hernia on his first examination, and stated definitely on his second examination that he found no evidence of either an abdominal wall hernia, or an inguinal hernia. Furthermore, although claimant may be partially incapacitated, under Section 8(d) of the Workmen's Compensation Act, proof of partial incapacity must include the difference between the average amount claimant earned before the accident and the average amount he is able to earn in some suitable employment after the accident. **Evans vs. State*, 13 C. C. R. 65; *Doyle vs. State*, 13 C. C. R. 179. From the record, the claimant is able to work. How much his earning power may have decreased since the accident is not shown.

For the reasons stated, award is denied.

(No. 3868—Claimant awarded \$742.53.)

HENRY HAYWARD, Claimant, *vs.* **STATE OF ILLINOIS**, Respondent.

Opinion filed June 12, 1945.

OLIVER A. CLARK, for claimant.

GEORGE F. BARRETT, Attorney General; **WILLIAM L. MORGAN**, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*when award may be made under.* Where an employee of the State sustains accidental injuries arising out of and in the course of his employment, an award for compensation thereof may be made in accordance with the provisions of the Workmen's Compensation Act, upon compliance by the employee with the requirements thereof.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint was filed on July 22, 1944, seeking compensation benefits for an injury received by the claimant on the 22nd day of March, 1944.

The record consists of the complaint, departmental report, transcript of evidence, and waiver of brief, statement and argument on behalf of claimant and respondent. The complaint alleges that Henry Hayward resides in Chicago, and was employed by the respondent in the Division of Highways as a laborer, working on the repair, maintenance, and construction of highways in the State of Illinois; that while so employed, he earned the sum of \$6.00 per day and worked six days a week; that on the 22nd day of March, 1944, his left hand slipped in to a mixing machine while he was mixing blacktop, injuring his third, index, and little fingers.

The complaint further alleges that the accident was reported immediately to his superior, and that he has been incapacitated for work by reason of said injury since the date thereof; that all medical care and attention was provided by the respondent and that he received nothing for temporary total compensation.

The complaint further alleges that as a result of said accident, he sustained the loss of the third finger by amputation, and has lost the use of his left hand, which he believes will result in the permanent loss of use of the hand. He seeks an award, under the Workmen's Compensation Act, for temporary total compensation and for specific injuries in the sum of \$3,000.00.

The evidence of this claimant was taken on the 7th day of April, 1945. At that time, a stipulation was entered into by and between the claimant and respondent that at the time of the alleged injury the claimant and respondent were operating under the Workmen's Compensation Act; that said claimant sustained an accidental injury, which arose out of and in the course of the employment; that notice was served upon the employer and that claim for compensation was made within the times

provided by said Act; that the annual wages of the employee were \$1,626.75; that the age of the claimant at the time of the accident was 62 years, and there were no children under sixteen years of age dependent upon him for support; that medical care was partially furnished, hospitalization was furnished; that compensation was paid during the temporary disability; that the questions to be decided here are: 1. The nature and extent of the injury, if any; and 2. Claim for medical; and temporary total compensation due, if any.

The evidence discloses that immediately after the claimant sustained the injury, he was taken to the St. Luke's hospital, where Dr. James C. McLallen rendered first aid. He was then placed in the care of Dr. H. B. Thomas, Orthopedic Surgeon. He testified that he **was** discharged by Dr. Thomas about the first day of April, 1945. In response to a question propounded to claimant regarding the condition of his hand at the present time, he testified that his hand hurts when it is straightened out and when he makes a fist, that it is a continuous pain. He was unable to grip anything small, that when he attempted to lift large objects, he could only hold it for a certain period of time, and then his hand gave away. Upon cross-examination, he testified that he could bend his middle finger to the first joint, and that he could not use his left hand as he had previously.

The evidence taken in this case is not satisfactory to the Court. It is not illuminating enough. There is, however, a report of the Division of Highways filed herein, which under Rule 21 is prima facie evidence of the facts set forth therein. This report substantiates in part the allegations in the complaint and the testimony of the claimant.' It shows that while claimant was on a platform at the side of a mixing machine, directing

its operation, his foot slipped and he fell forward, thrusting his left hand into the drum of the mixer. The fingers of his left hand were caught between the agitator blades and the inside surface of the drum of the mixer, badly lacerating the middle and ring fingers. This report contains copies of three reports filed with the Division of Highways by Dr. H. B. Thomas, Professor Emeritus of Orthopedics, University of Illinois, College of Medicine, and are set out herewith in full:

"March 21, 1944, Mr. Norman Beggs sent Mr. Henry Hayward to St. Luke's Hospital where he was examined. On March 21, Mr. Hayward's left hand was caught in a tarring machine, as a result of which he severed the distal phalanx of the ring finger. This end phalanx hung by the two volar branches of the nerves of this finger and part of the tendon sheath of the flexor tendon. Both flexor and extensor tendons were severed, as were all the other tissues. The patient wanted very much that this finger be saved but the stump had no circulation whatever, so repairing the finger was out of the question. Enough bone was taken off of the 2nd phalanx so that it could be covered with viable skin. There was also a longitudinal laceration on the volar surface of this finger, extending almost to the first finger joint. The middle finger contained a longitudinal cut on the dorsal surface and extended through the tendon to the bone. This extensor tendon was quite macerated but was continuous. He is still in the hospital."

April 13, 1944, Dr. Thomas reported to the Division: "Mr. Henry Hayward was again seen this morning (4-13-44). All of his wounds are healed. The stump is slightly swollen but he is progressing satisfactorily and should be ready for light work."

May 12, 1944, Dr. Thomas made his final report to the Division which is as follows: "The distal phalanx of the ring finger is free and hanging by a couple of shreds of tissue. The middle finger presents a shredded cut over dorsal surface in middle phalanx. The ring finger was amputated in middle of 2nd phalanx. The wound of middle finger was debrided and sutured. This extensor tendon was quite shredded. When seen on May 3, he still complained of pain. The stump of the ring finger has a range of 15". The distal inter-phalangeal joint of the middle finger moves but a few degrees."

The report further discloses that compensation for temporary total disability was paid claimant for the period March 29, 1944, to April 13, 1944, inclusive, at

the rate of \$18.38 per week, totalling \$42.01. The report further states that compensation was terminated April 13, 1944, the day Dr. Thomas reported "as progressing satisfactorily and should be ready for light work" and that the Division paid the following creditors in connection with the injury suffered by claimant:

Dr. H. B. Thomas, Chicago.....	\$116.00
St. Luke's Hospital, Chicago..	60.00

Dr. T. C. Henderson was called on behalf of respondent who testified he examined claimant on or about October 20, 1944, and found that claimant had an injury to his left hand, consisting of an amputated ring finger at the middle of the second phalynx, and that the middle finger was ankylosed and had a range of about fifty per cent. He was unable to grip small articles. Upon examination of the claimant, he found that the industrial use of claimant's left hand had been reduced to about fifty per cent, and that in his opinion the claimant could only do light work, which would not require the exercise of forcing the hand.

This record establishes that the claimant and respondent were, on March 29, 1944, operating under the provisions of the Workmen's Compensation Act; that on the day last above-mentioned, said claimant sustained accidental injuries, which arose out of and in the course of the employment; that notice of said accident was given to said respondent and claim for compensation therefor was filed within the time required under the provisions of said Act.

That the earnings of the claimant during the year next preceding the injury were \$1,626.75 (One Thousand Six Hundred Twenty-six Dollars and Seventy-five Cents) and that the average weekly wage was \$31.28 and His compensation rate was \$17.63.

That the necessary first aid, medical, surgical and hospital services have been provided by the respondent herein.

That the respondent paid to the claimant the sum of \$42.01 temporary total compensation for the period March 29, 1944, to April 13, 1944, inclusive, upon which day he was released by Dr. Thomas for work.

The Court finds that claimant suffered the loss by amputation of the ring finger of his left hand and fifty per cent loss of use of the middle finger of his left hand.

The Court further finds that claimant is entitled to have and receive from the respondent the sum of \$17.63 for a period of twenty-five weeks, amounting to the sum of \$440.75, for the loss of the third finger of his left hand and the further sum of \$17.63 for a period of 17½ weeks for the reason that the injury sustained to the second finger of claimant's left hand amounted to a fifty per cent permanent loss of use of said finger, all of which has accrued and is payable in a lump sum.

An award is therefore 'hereby entered in favor of the claimant and against the respondent as follows :

The sum of \$440.75 specific award for the loss by amputation of the third finger of claimant's left hand and the further sum of **\$308.53** for fifty per cent of the permanent loss of use of the second finger of claimant's left hand, making a total award in the sum of \$749.28 from which must be deducted the sum of \$6.75 overpayment by the Division of Highways, leaving the sum of \$742.53 all of which has, accrued and is payable forthwith.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3869—Claimant awarded \$1,175.00.)

ARCH KENNEDY AND MABLE KENNEDY, ET AL., Claimants, *vs.*
STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

J. L. SULLIVAN AND DILLAVOU & JONES, for claimants.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*accidental injury resulting in death of employee — dependency — when award will be made.* Where an employee sustained accidental injuries resulting in his death, and the evidence clearly indicates that his parents were partially dependent upon the deceased for support, an award may be made in accordance with Section 7 (c) of the Workmen's Compensation Act.

ECKERT, J.

Claimants, Arch Kennedy and Mable Kennedy, are the father and mother of Hubert M. Kennedy, deceased, a former employee of the Department of Public Works and Buildings of the State of Illinois. The claimant, Arch Kennedy, is also administrator of the Estate of Hubert M. Kennedy; and Kathryn Kennedy, Roy Kennedy, Anita Fay Kennedy, Max Kennedy, and Ray Allen Kennedy are brothers and sisters of the deceased, and are all under sixteen years of age. On July 6, 1944, while deceased was assisting his foreman in the removal of a large limb of a tree overhanging U. S. Highway No. 36, the limb was dislodged from the fence upon which it fell, and the large end of the limb struck the decedent on the right side of the head, pinning him to the ground. Dr. E. C. Conn of Chrisman, Illinois, was immediately called to the scene of the accident, but Kennedy died before the doctor's arrival. The claimants seek an award under the provisions of the Workmen's Compensation Act in the amount of \$3,384.00.

At the time of the accident which resulted in the death of Hubert M. Kennedy, employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident was filed and claim for compensation made within the time provided by the Act. The accident arose out of and in the course of decedent's employment.

Decedent was first employed by the respondent on March 10, 1944, as a laborer at a wage of sixty cents per hour and continued at that wage rate and in that classification until the date of his death. Employees engaged in the same capacity as decedent worked an average of 227 days a year, and eight hours constituted a normal working day. Under Section 10(e) of the Workmen's Compensation Act, compensation must be computed on the basis of an annual wage of \$1,089.60, making decedent's average weekly wage \$20.95, and his compensation rate \$10.47. The death having occurred as a result of an injury sustained after July 1, 1943, this rate must be increased $17\frac{1}{2}\%$, or \$1.83, making a compensation rate of \$12.30. The decedent was unmarried and was twenty-four years of age at the time of his death.

This claim is based upon the alleged dependency of the parents and minor brothers and sisters of the decedent. Arch Kennedy, the father, is employed as a section man on the New York Central Railroad, Cairo Division. A brother of the decedent, Gene Kennedy, seventeen years of age, is employed by the State of Illinois, Division of Highways. It is alleged that the father and the decedent contributed equally to the support of the mother and the brothers and sisters of the decedent under sixteen years of age.

Section 7(c) of the Workmen's Compensation Act provides as follows :

"If no amount is payable under paragraph (a) or (b) of this section, and the employee leaves any parent or parents, child or children, who at the time of the injury were partially dependent upon the earnings of the employee, then such proportion of a sum equal to four times the average annual earnings of the employee as such dependency bears to total dependency, but not less in any event than \$1,000.00, and not more in any event than \$3,750.00. * * *

Dependency under the Workmen's Compensation Act is a question of fact. *Crane Co. vs. Industrial Commission*, 378 Ill. 190. The test of partial dependency is whether the contributions from the deceased were relied on by the claimants to aid and maintain them in their position in life and whether they were to a substantial degree depending upon the support of the deceased at the time of his death. *Ritzman vs. Industrial Commission*, 353 Ill. 34.

Hubert M. Kennedy, at the time of his death, was unmarried, and was living with his mother and father and minor brothers and sisters. Claimant, Arch Kennedy, his father, testified that the deceased helped to provide for the family by buying food and clothing and coal, and helped pay the rent for a period of eight years, and that while he worked for respondent, he contributed about half his salary to the support of the family. Arch Kennedy did not testify as to his own earnings.

The testimony of decedent's father was corroborated by various other witnesses: Clint Bridewell testified that the decedent bought groceries for the family at least two or three times a week, spending each time from \$2.50 to \$5.00; Reginald Van Dyke, manager of a grocery store, testified that Arch Kennedy, his son Hubert, and his son Gene, collectively purchased about \$20.06 worth of groceries from him each Saturday night; Marshal Hill, a store keeper, testified that the decedent bought groceries from him for the Kennedy family once or twice each week. Mabel Kennedy, mother of the deceased,

testified that her son contributed to the support of the family; that he bought groceries, dresses, stockings, and play suits for the children, as well as coal; that he helped pay the rent and half of the feed for the hogs which the family raised; that prior to the death of Hubert, Gene contributed little to the support of the family. She stated that she did not know what her husband's earnings were, nor the earnings of her son, Gene.

From the evidence, it clearly appears that the decedent contributed to the support of his parents and his brothers and sisters under sixteen years of age. The claimants contend that they were partially dependent upon the earnings of the decedent to the extent of 50% of their support. This proportion, however, is not established by the evidence. Neither the amount actually spent or contributed by the deceased are shown, nor does it appear from the record what amounts were earned and contributed to the family support by the father and the brother, Gene. Three members of the claimants' family were contributing to its support, but the amount contributed by any one of them is not shown, and there is no evidence of the earnings of any of them except the earnings of the deceased. It is incumbent upon the claimants to establish the degree of partial dependency. They have shown that partial dependency did exist, but they have failed to establish a claim to more than the minimum award provided in the Act.

The court, therefore, finds that the parents of Hubert M. Kennedy were partially dependent upon him for support; that the minimum award should be made to the parents of Hubert M. Kennedy under Section 7(c) of the Workmen's Compensation Act; that no award can be made under Section 7(d) to their minor children.

Award is entered in favor of the claimants, Arch Kennedy and Mable Kennedy in the amount of \$1,000.00, the minimum provided under Section 7(c) of the Workmen's Compensation Act, which amount must be increased 17½% under the provisions of paragraph (L) of Section 7, making an aggregate award of \$1,175.00, to be paid to Arch Kennedy and Mable Kennedy, as follows:.

\$599.18 which has accrued and is payable forthwith.

The balance of \$575.82 is payable in weekly installments of \$12.30 each, beginning June 12, 1945, for a period of 46 weeks with an additional final payment of \$10.02.

An award as to all other claimants is specifically denied.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor.

(No. 3874—Claimant awarded \$4,700.00.)

MARY RECRNOR, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

T. M. ANDERSON, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—when award may be made under. Where an employee at State Division of Highways sustains injuries, resulting in his death, during the course of and within the **scope** of his employment an award may be made to his surviving wife, under

Section 7, paragraph (a) and (1) of the Workmen's Compensation Act upon compliance with the requirements thereof.

FISHER, J.

Claimant, Mary Recknor, is the surviving wife of Clark L. Recknor, who, on March 11, 1942, was employed by the State of Illinois, Division of Highways. He was classified as a laborer, at a wage rate of \$.60 per hour. He continued to work in this capacity until the 8th day of July, 1944, at which time he was a member of a highway maintenance crew assigned to pick up broken tree limbs, brush and other debris that had been blown by a storm onto the highways during the preceding night. The crew drove in a Division Highway truck from Earlville on U. S. Route 34 to its juncture with the spur leading to the Village of Leland, LaSalle County. At this point the crew began loading the truck with debris. They proceeded North to the Village of Leland and then turned around and drove South. In these operations Mr. Recknor remained in the body of the truck to distribute the materials passed up to him by other workmen. The truck was driven approximately one and one-half miles south of Leland, where the debris was to be deposited preliminary to disposition by fire. Upon arriving at this point it was learned that Mr. Recknor was not on or near the truck. He was later found lying on the shoulder of the highway a short distance to the North. He was apparently unconscious, and a doctor was called immediately. Dr. O. H. Fischer of Earlville arrived in about forty-five minutes and pronounced Mr. Recknor dead.

Mr. Kenneth Schroeder, who was driving a truck for the Hannah Oil Company, reported as follows :

"On the morning of July 8, 1944, I was traveling north on U. S. Route 34, in a Hannah Oil Co. truck south of Leland. A yellow Divi-

sion of Highways truck traveling south approached my truck. When the highway truck was about 300 feet away I saw some branches with leaves on them raise up above the truck body. Immediately after this I saw a large tree branch raise up above the truck body. I then saw a man raise up and grab at the side of the truck. The large tree branch raised out of the truck and fell onto the shoulder. The man fell over the side of the truck after the large branch went out. I stopped my truck on the slab opposite the body and got out. The body was on the shoulder with the feet four or five inches from the slab and about square with the pavement. The man was on his right side. I removed some branches that were on top of him. He was bleeding quite a bit from the nose and ears. I held his wrist to feel his pulse. It lasted two or three minutes, then I could not feel it. I flagged a south bound car with two men in it. They stopped and one of the men ran into a nearby house and called a doctor and ambulance."

Dr. O. H. Fischer, reported to the Division of Highways, as follows:

"Patient fell off a moving truck, apparently landing on his head, which resulted in a basal skull fracture, evidenced by copious bleeding from the ears and nose. I was called to see the patient on the highway. He had expired shortly before I arrived at the scene of the accident."

The record consists of the Complaint, Departmental Report, Stipulation, Claimant's Abstract, Brief and Argument, and Waiver of Brief and Argument by Respondent.

The material facts of this case are admitted by stipulation.

Decedent left his wife him surviving, and no children under the age of 16 years. His salary for the year prior to his death amounted to \$1,336.80.

We conclude that Clark L. Recknor and respondent were operating under the provisions of the Workmen's Compensation Act; that the said Clark L. Recknor died as a result of injuries sustained during the course of and within the scope of his employment; and that the surviving wife of decedent is entitled to the benefits of the Workmen's Compensation Act.

Under Section 7, paragraphs (a) and (1) of said Act, claimant as surviving wife and beneficiary of the decedent, is entitled to have and receive from respondent the sum of Four Thousand Seven Hundred Dollars (\$4,700.00), payable at the rate of \$15.09 per week.

An award is therefore entered in favor of claimant, Mary Recknor, in the sum of Four Thousand Seven Hundred Dollars (\$4,700.00), payable as follows:

\$724.32, which is accrued up to June 9, 1945 and is payable forthwith;

\$3,975.68, payable in weekly installments of \$15.09 beginning June 16, 1945.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3878—Claimant awarded \$5,031.00.)

ESTHER M. CARVER, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

Claimant, pro se.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*Parole Agent of the Department of Public Safety wathan provisions of— when award may be made under.* Where it appears that a parole agent of the Department of Public Safety, while enroute on orders from his superior, sustains injuries causing his death, as a result of a collision, between the automobile in which he was riding and another automobile, the accident arose out of and in the course of the decedent's employment, and an award may be made under Section 7 (a) of the Workmen's Compensation Act upon compliance with the requirements thereof.

ECKERT, J.

Claimant, Esther M. Carver, is the widow of Addis Bertrand Carver, a former adult parole agent of the

Department of Public Safety of the State of Illinois. On March 13, 1944, while en route from Canton, Illinois, to Springfield, Illinois, by order of his superior, claimant's husband sustained serious injuries when the car in which he was riding struck an automobile approaching from the opposite direction. Immediately following the collision, Carver was taken to St. Clara's Hospital, Lincoln, Illinois, by ambulance, and three physicians and surgeons were called. His injuries were diagnosed as "fractured skull, compound fractures of the right leg, contusions, and abrasions." He did not regain consciousness and died five days later. Claimant, as widow of the deceased employee, seeks an award under the Workmen's Compensation Act in the amount of \$4,700.00, and expenditures on account of medical and hospital services in the amount of \$331.00.

At the time of the accident, which resulted in the death of Addis Bertrand Carver, employer and employee were operating under the provisions of the Workmen's Compensation Act of this State. Notice of the accident and claim for compensation were made within the time provided by the Act. The accident arose out of and in the course of decedent's employment.

Decedent had been employed by the respondent continuously for more than one year prior to his death, and his annual earnings were \$2,341.81. Under Section 10(a) of the Workmen's Compensation Act, compensation must be computed on the basis of this annual wage, making decedent's average weekly wage \$45.03, and his compensation rate the maximum of \$15.00 per week. At the time of his death, decedent had no children under sixteen years of age dependent upon him for support.

Claimant is, therefore, entitled to an award under Section 7 (a) of the Workmen's Compensation Act in the

amount of \$4,000.00. The death having occurred as a result of an injury sustained after July 1, 1943, this amount must be increased $17\frac{1}{2}\%$, or \$700.00, and the weekly rate must be increased $17\frac{1}{2}\%$, or \$2.63, making a compensation rate of \$17.63 per week.

Claimant is also entitled to be reimbursed for moneys expended on account of hospital and medical services as follows:

M. C. Hutchcraft, Lincoln, Illinois, ambulance service.	\$ 5.00
Dr. Anthony Drummy, Lincoln, Illinois	125.00
Dr. Robert Boyd Perry, Lincoln, Illinois.	25.00
Dr. E. P. Coleman, Canton, Illinois..	50.00
St. Clara's Hospital, Lincoln, Illinois.	126.00
<hr/>	
Total	\$331.00

Award is, therefore, made in favor of the claimant, Esther M. Carver, in the amount of \$5,031.00, to be paid to her as follows:

\$331.00, reimbursement for hospital and medical services which is payable forthwith.

\$1,148.47 which has accrued and is payable forthwith.

The balance of \$3,551.53 payable in weekly installments of \$17.63 each, beginning June 12, 1945, for a period of 201 weeks, with an additional final payment of \$7.90.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor.

(No. 3884—Claim denied.)

THOMAS NORTON, Claimant, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

RAY I. KLINGBIEL, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*making claim for compensation and filing application therefor within time fixed by Section 24 of Act is a condition precedent to jurisdiction of Court.* Where the record discloses that no application for compensation was filed by employee within one year after date of injury, no compensation having been paid therefor, the court is without jurisdiction to proceed with hearing on claim filed thereafter.

CHIEF JUSTICE DAMRON delivered the opinion of the court :

This complaint was filed on October 10, 1944. It alleges that on the 2nd day of July, 1941, the claimant, Thomas Norton, was employed as an attendant at the East Moline State Hospital in charge of a painter's detail, and while working on a window located in the women's infirmary and while standing on a ladder at a height of about fifteen feet, the ladder broke, causing claimant to fall to the ground, striking his right foot and right heel; that as a result of said fall, the claimant received a second degree laceration of the metatarsal aspect of the foot and heel. An x-ray of the ankle and foot revealed a comminuted fracture of the os calcis.

The complaint also alleges that all medical, surgical, hospital, etc., in connection with this injury has been furnished by the State, with the exception of railroad fare paid by this claimant in going to and from Chicago.

He seeks an award under the Workmen's Compensation Act for twenty-five per cent functional disability to his right foot.

The Attorney General files a motion to dismiss the complaint on the ground that it was not filed within one year after the date of the accident, in accordance with provisions of Section 24 of the Workmen's Compensation Act. It has been repeatedly held by this Court that the making of claim for compensation and filing application therefor within the time fixed by Section 24 of the Workmen's Compensation Act is a condition precedent, without which the Court of Claims is without jurisdiction to enter an award. *Boismenuue vs. State*, 12 C. C. R. 36; *Koleitavs. State*, 12 C. C. R. 217; *Scott vs. State*, 13 C. C. R. 163; *City of Rochelle vs. Industrial Commission*, 332 Ill. 386; *Inland Rubber. Co. vs. Industrial Commission*, 309 Ill. 43; *Simpson vs. State*, 10 C. C. R. 394; *Baker vs. State*, 10 C. C. R. 111.

This Court has recently held that Section 24 of the Act provides that the right to file application for compensation shall be barred unless such application is filed within one year after the date of accident where no compensation has been paid, or within one year after the date of the last payment of compensation wherein any has been paid. *Scott vs. State*, supra.

The complaint shows on its face that the accident occurred on the 2nd day of July; 1941, and that no compensation was paid to claimant subsequent to said injury. It also shows on its face that the complaint was not filed until the 10th day of October, 1944. This Court is without jurisdiction to hear this complaint.

The motion of the respondent is therefore granted. Case dismissed.

(No. 3888—Claimant awarded \$4,700.00.)

VERA JUNE WINFIELD, WIDOW OF EARL WINFIELD, DECEASED,
Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

JOHN A. MEAD AND SAMUEL J. NAYLOR, for claimant.

GEORGE F. BARRETT, Attorney General; WILLIAM L.
MORGAN, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*employer in the Division of Highways of the Department of Public Works and Buildings within provisions of—when award may be made under.* Where record discloses that an employee of the Division of Highways of the Department of Public Works and Buildings, sustains an injury, resulting in death which arose out of and in the course of his employment an award for compensation therefor may be made under the Workmen's Compensation Act upon compliance with the requirements thereof.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint was filed on November 14, 1944. It, seeks an award for the death of claimant's husband which occurred on the 26th day of September, 1944.

The record consists of the complaint, departmental report of the Division of Highways, stipulation waiving brief, statement and argument on behalf of claimant and respondent.

The record discloses that the deceased, Earl Winfield, was first given employment by the respondent on the 25th day of March, 1941, in the Division of Highways of the Department of Public Works and Buildings. He continued in such employment until the date of his death. The record further discloses that the deceased at the time of the accident on August 9, 1944, was operating a power mower for respondent along the upper edge of an embankment about five miles northwest of the village of Bowen. The level space between the edge of the em-

bankment and the fence at the right-of-way line narrowed as the embankment became higher and while driving said mower along the above described terrain, the bank crumbled from under the right rear wheel of the mower, causing it to tip over. The deceased jumped down the bank to avoid the possibility of the 'mower turning over on him. The bank being steep, the deceased landed with considerable momentum which caused him to run down the bank onto the concrete pavement before he was able to come to a stop. The mower followed down the bank, overturned, stopping upside down on the pavement with the motor running. The deceased ran over and shut off the motor. In jumping and falling to the pavement, the deceased sustained bruises and thereafter became stiff and sore, but he continued to work until quitting time at 5:00 P. M., then he went home. The claimant voided immediately after he returned home and noticed blood in his urine. During the evening he continued to have distress and frequently voided bloody urine. His discomfort increased, and the claimant called Dr. Earl Cooper, of Augusta, about 3:00 the next morning. The doctor found the claimant's intestate in intense pain, unable to void, and his bladder distended. Catheterization was done and the bladder was found to be filled with blood clots and bloody urine. On August 16, 1944, Dr. Cooper recommended hospitalization and that Dr. Arthur Sprenger, a urologist, be called in attendance. Mr. Winfield was moved by ambulance to St. Francis Hospital that same day and was placed under the care of Dr. Sprenger, who attended him until his death.

On September 5, Dr. Cooper sent the following report to the Division of Highways:

"Patient's story of accident: Mowing on hillside. Mower slipped, throwing it off balance and causing loss of control; mower rolled onto middle line pavement. He was thrown, landing on pavement below. Nature of injury: Traumatism—result of impact of landing resulting in diffused severe hemorrhage. Frequent urination. Constant pain, formation of tumor undetermined previously not present. Tests revealed blood in urine. Treatment: Rest in bed. Transferred to Dr. Sprenger, urologist in Peoria, Illinois. Hospitalized."

Dr. Sprenger also filed a report on the same day which is as follows :

"Patient's story of accident: Mowing on hillside. Mower slipped, throwing it off balance and causing loss of control; mower rolled onto middle line pavement. He was thrown, landing on pavement below. Nature of injury: Distended bladder, blood clots, and a marked secondary anemia. No visible signs of injury. The bleeding may have been accentuated by the injury. Treatment: Suprapubic cystotomy, removal of tumor tissue. Blood transfusions as needed. Later resection of remainder of bladder tumor. Estimated date of discharge: Unable to say."

Because of the history of the injury, the death was reported to the coroner, who ordered an autopsy which was performed by Dr. J. M. Martin, Peoria, at 10:15 A. M. the same morning. Dr. Martin's finding was as follows :

"Anatomical Diagnosis"

1. Status post suprapubic cystotomy
2. Large perivesical and retroperitoneal abscess on the left side.
3. Large partially necrotic papilloma of the bladder.
4. Fetid purulent ascending cystopyelonephritis.
5. Subacute splenitis.
6. Central fatty infiltration of the liver.
7. Depletion of lipoid in the adrenal cortex.
8. Anemia of the myocardium.
9. Recurrent verrucous endocarditis of the aortic and mitral valves.
10. Mucous gastritis.
11. Emaciation."

On September 27, Dr. Sprenger filed the following report with the Division of Highways:

"Treatment: Patient received blood transfusion on admittance. Cystoscopy performed. Two days later, suprapubic cystotomy followed by repeated blood transfusions. Remainder of tumor mass removed by trans-urethral resection. Remarks: This patient was practically moribund on admittance. In spite of all treatment patient gradually became worse and died September 26, 1944."

The record discloses that the Division of Highways has paid the following accounts : Dr. Earl Cooper \$35.00; Dr. Arthur Sprenger \$560.00 ; Dr. George Parker \$19.00; St. Francis Hospital \$526.85 ; Stillwell Funeral Home \$20.00 ; Total \$1,160.85.

From a consideration of the record we find as follows :

That on the 9th day of August, 1944, the said Earl Winfield and respondent were operating under the provisions of the Workmen's Compensation Act of the State of Illinois. That on said date, said Earl Winfield sustained accidental injury which arose out of and in the course of his employment from which he died on September 26, 1944. That notice of the accident was given to the said respondent and claim for compensation was made by the above named claimant, within the time required by the provisions of such Act.

That the earnings of said employee during the year preceding the accident were \$1,416.15 and his average weekly wage was \$27.23. That at the time of the accident he was 32 years of age, married to claimant, and had no children dependent upon him under the age of 16 years.

We find that claimant's intestate was totally disabled as a result of said accident from August 10 to September 26 inclusive, and that he was paid by the respondent \$109.71 temporary compensation for that period which must be deducted from the award. All medical and hospitalization expenses incurred were paid by the respondent.

An award is therefore entered in favor of claimant, Vera June Winfield, in the sum of \$4,700.00, as provided in Section 7 (a) and (1) of the Act, from which must be deducted the sum of \$109.71, leaving a balance of \$4,590.29, to be paid to her by the respondent at \$16.00 per week. The sum of \$592.00 in a lump sum, representing 37 weeks compensation which has accrued from September 27, 1944, to June 13, 1945. The remainder of said award amounting to the sum of \$3,998.29, to be paid to claimant at the rate of \$16.00 per week for 249 weeks with one final weekly payment of \$14.29. All future payments being subject to the terms and provisions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry for such further orders as may from time to time be necessary.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3894—Claimant awarded \$4,700.00.)

LULA SCHIERBAUM, Claimant, *vs.* STATE OF ILLINOIS; Respondent.

Opinion Pled June 12, 1945.

R. WALLACE KARRAKER, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*attendant at Elgin State Hospital within provision of—when award may be made under.* Where it appears that claimant was in charge of the violent ward at the Elgin State Hospital, and while endeavoring to hold and restrain a violent patient suffered a coronary occlusion which caused his death. The accident arose out of and in the course of his employment and an award may be made for compensation therefor under the Workmen's Compensation Act upon compliance with the requirements thereof.

ECKERT, J.

Claimant, Luia Schierbaum, is the widow of Albert W. Schierbaum, deceased, a former employee of the Department of Public Welfare of the State of Illinois. On May 16, 1944, while in charge of a violent ward at the Elgin State Hospital, and while endeavoring to hold and restrain a violent patient, the deceased suffered a coronary occlusion which caused his death on May 31, 1944. Claimant seeks an award under the provisions of the Workmen's Compensation Act in the amount of \$5,000.00.

At the time of the injury which resulted in the death of Albert W. Schierbaum, employer and employee were operating under the provisions of the Workmen's Compensation Act of this State, and notice of the accident and claim for compensation were made within the time provided by the Act. The employee was disabled-unexpectedly in the course of his employment, without any act or design upon his part. The court is of the opinion that he suffered an accidental injury arising out of and in the course of his employment. *Marsh vs. Industrial Commission*, 386 Ill. 11.

Decedent had been employed by the respondent less, than one year prior to his death. Employees of the same class in the same employment as decedent earned an annual wage of \$1,320.00, including maintenance. Under Section 10(c) of the Workmen's Compensation Act, compensation must, therefore, be computed on the basis of an annual wage of \$1,320.00, making decedent's average weekly wage \$25.38, and the compensation rate \$12.69. Decedent had no children under sixteen years of age dependent upon him for support at the time of his death.

Claimant is, therefore, entitled to an award under Section 7 (a) of the Workmen's Compensation Act in the

amount of **\$4,000.00**. The death having occurred as the result of an injury sustained after July 1, 1943, this amount must be increased $17\frac{1}{2}\%$ or \$700.00, and the compensation rate must be increased $17\frac{1}{2}\%$, or **\$2.22**, making a compensation rate of **\$14.91** 'per week.

The claim for medical services after decedent was transferred from the Elgin State Hospital to his home at Vienna, in the amount of \$25.00, can not be allowed. The transfer was at the request of the decedent, and in so doing, he elected to secure his own physician.

Award is, therefore, made in favor of the claimant, Lula Schierbaum, in the amount of **\$4,700.00**, to be paid to her as follows :

\$834.96 which has accrued and is payable forthwith.

The balance of **\$3,865.04** payable in weekly installments of **\$14.91** each, beginning June 26, 1945, for a period of-259 weeks with an additional final payment of **\$3.35**.

All future payments being subject to the terms and conditions of the Workmen's Compensation Act of Illinois, jurisdiction of this cause is specifically reserved for the entry of such further orders as may from time to time be necessary.

(No. 3897—Claimant awarded \$6,462.50.)

MARY A. SKAGGS, ET AL., Claimant, vs. STATE OF ILLINOIS,
Respondent.

Opinion filed June 12, 1945.

MARY A. SKAGGS, pro se.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

WORKMEN'S COMPENSATION ACT—*Guard at Statesville Prison within provisions of—when award may be made. Where a guard at Statesville*

Prison was taken as hostage by vicious inmates attempting to escape, and as result of ensuing cross fire received bullet wounds which caused his death, the injury and death arose out of and in the course of his employment and an award may be made for compensation therefor to his surviving wife and minor dependents under the Workmen's Compensation Act, Section 7, paragraph (a) upon compliance with the requirements thereof.

CHIEF JUSTICE DAMRON delivered the opinion of the court:

This complaint was filed on January 9, 1945, by the above-named claimants, who seek an award under the provisions of the Workmen's Compensation Act, for the death of Zoeth C. J. Skaggs, the husband of Mary A. Skaggs, and the father of the above-named minor claimants.

The record consists of the complaint, a report of the Department of Public Safety, a report of the Department of Public Health, Division of Vital Statistics, and stipulation by and between Mary A. Skaggs, pro se, as claimant and the Honorable George F. Barrett, Attorney General, for the respondent, and photostatic copy of the marriage certificate of Mary A. Skaggs and Zoeth C. J. Skaggs, waiver of brief of claimant and waiver of brief of respondent.

This record discloses that the widow claimant and the deceased Zoeth C. J. Skaggs were united in marriage on the 27th day of May, 1931. The records of the Department of Public Health, Division of Vital Statistics, show that the following children were born to this marriage: William Frederick Skaggs, born September 4, 1932; Robert Jerome Skaggs, born November 1, 1934; Hall Murray Skaggs, born October 29, 1936; and Raymond Gerald Skaggs, born September 2, 1938.

The record further discloses that claimant, Mary A. Skaggs, and each of the above-named minor children,

were all living with and dependent upon the earnings of Zoeth C. J. Skaggs at the time of his death.

The record further discloses that the deceased husband of claimant was first employed by the respondent on May 8, 1930, as a guard at the Joliet Branch of the Illinois State Penitentiary. His salary at the time of first employment was \$115.00 per month plus maintenance. He continued in his employment as a guard until the time of his death on November 24, 1944. On July 1, 1943, his salary was raised to \$169.00 a month, which last amount he was receiving at the time of his death. The total salary received by Mr. Skaggs during the year next preceding his death was \$2,028.00.

On November 24, 1944, between 10:00 and 10:30 A. M., Mr. Skaggs was taken as a hostage by vicious inmates who were attempting to escape from the Stateville prison. Mr. Skaggs was acting in the capacity of guard at the time he was made a hostage. In their attempt to escape in a truck, the inmates holding Mr. Skaggs as a captive were fired upon by guards stationed at various points on the wall enclosure of the penitentiary. As a result of the cross fire, Mr. Skaggs received bullet wounds which proved fatal. Drs. Chmelik, Joliet, and Roblee, Lockport, were called to attend Mr. Skaggs. He died approximately 1½ hours following his injury.

From a full consideration of the record, the Court finds that the deceased, Zoeth C. J. Skaggs, and respondent, were at the time of the accident and death of the former, operating within the terms of the Workmen's Compensation Act; that the injury and death of Zoeth C. J. Skaggs was caused by an accident which arose out of and in the course of his employment by the respondent; that respondent had actual knowledge of the accident and notice of claim and application for compensa-

tion were made within the time required under the provisions of said Act; that the deceased's annual earnings for the year preceding his death amounted to \$2,028.00, making the average weekly wage amount to the sum of \$39.00; that he left surviving him the widow, William Frederick Skaggs, Robert Jerome Skaggs, Hall Murray Skaggs, and Raymond Gerald Skaggs, all of whom are under the age of sixteen years and were dependent upon deceased for support.

An award is hereby entered in favor of claimants in the sum of **\$6,462.50**, as provided in Section 7, Paragraphs (a) and (1) of the Workmen's Compensation Act, as amended. This award is payable to claimant, Mary A. Skaggs, in monthly installments, at a weekly compensation rate of **\$23.50**. On June 8, 1945, there will be accrued the sum of **\$658.00**, representing **28** weeks, which is payable to claimant in a lump sum.

The remainder of said award, amounting to the sum of **\$5,804.50**, is payable to claimant in weekly installments of **\$23.50** for **247** weeks.

The future payments before referred to, being subject to the terms of the Workmen's Compensation Act, jurisdiction of this cause is hereby retained by this Court for the purpose of making such further orders as may from time to time be necessary herein.

This award is subject to the approval of the Governor as provided in Section 3 of "An Act concerning the payment of compensation awards to State employees."

(No. 3901—Claimant awarded \$1,907.80.)

EVERETT AND DOROTHY BAILEY, Claimants, vs. STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

NEIL KERR, for claimants.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

CONTRACT—premises leased to State for a particular purpose—when used otherwise the lessee liable for resulting damages. When premises are leased to the State for a specific purpose, there is an implied restriction against other uses. A subsequent change in the use of the premises by the lessee, without the prior consent of the lessor, renders the State liable for any consequent damage to the demised premises.

FISHER, J.

Respondent, through the Department of Public Works and Buildings, Division of Highways, leased from claimants two buildings for general storage purposes in connection with the maintenance of highways.

On September 7, 1944, one of the buildings was destroyed by fire. The building was a frame structure 50 feet long, 40 feet wide and 14 feet high on one side and 10 feet on the other. The respondent had possession of the said property under a lease whereby rent in the amount of \$65.00 per month was paid by respondent. Upon the land of claimants and adjoining the property so destroyed, the Division of Highways had set up machinery for weighing, drying and mixing asphalt and crushed stone and for elevating the mixed materials into trucks. On September 7, 1944, employees of the Division of Highways lighted a burner used to heat a kettle for the purpose of preparing an asphalt mix. After the burner had been lit for about fifteen minutes, some of the liquid asphalt was drawn from the kettle because the molten asphalt was rising. However, the asphalt

continued to rise, and the oil burner was shut off. Before the flame completely died the contents of the kettle boiled over and ignited. Employees of the respondent attempted to quench the fire, without success, and it spread to and destroyed the adjoining building.

Appraisers for the Division of Highways have set the value of the building destroyed at One Thousand Three Hundred Twenty-five Dollars (\$1,325.00) and the value of claimants' personal property destroyed at Eight Hundred Eighty-two and 80/100 Dollars (\$882.80).

There is no disagreement between claimants and respondent as to the facts or as to the value of the property destroyed.

The record consists of the Complaint, Stipulation, Report of the Division of Highways, Statement, Brief and Argument by claimants and respondent, and copy of Lease.

On consideration of this claim at the May 1945 term of this Court, we concluded that the rights of the parties must be determined from the existing lease and, the lease not being before us at that time, we continued the claim for further evidence. The lease was, thereafter, on May-11, 1945, introduced into the record, and we now proceed to a consideration of the claim from the entire record, including the Lease referred to.

The Attorney General contends that the property of claimants was destroyed by fire resulting from an accident, and that respondent is not legally liable therefor for the reason that the State is not liable for damages caused by the negligence of its employees while engaged in a governmental function. As we pointed out in our original opinion—this contention is, without doubt, correct where the action is founded in tort, but in this case the action is based on a contract, and the rule contended

for by the respondent does not apply. *Large vs. State*, 9 C. C. R. 480.

Respondent leased the said premises on March 1, 1942, to continue thereafter until June 30, 1943, unless sooner terminated by Lessee. After June 30, 1943, respondent remained in possession of the same premises, and admits, did so under the same terms and conditions of the written lease. At the expiration of the said lease, respondent held over and continued to pay an agreed increase in rent. The lease provided:

"In consideration of said demise, the Lessee covenants and agrees with Lessor as follows:

(1) "* * *"

(2) "To use and occupy said premises for storage purposes and that lessee will replace at its own expense any glass or fixtures which may be damaged or broken by the lessee or its agents during the occupancy by the lessee of said premises."

Had respondent confined its use of the said premises to the purpose for which it was demised, no recovery could be had by the lessor for its destruction by fire. The liability of the lessee is restricted to the provisions of the lease and, by excluding therefrom liability for damages by fire, it is necessarily implied that no such liability was intended.

However, lessor demised the premises for a specific purpose, "storage purpose," which purpose was not hazardous, and there was little danger of fire damage to the property from such use. It must be considered that had lessor known the use which respondent was to make of the premises, other and additional safeguards could have been taken by lessor to protect his property.

The use of the premises was restricted to storage purposes and not to the hazardous use of heating and mixing asphalt.

"To constitute a restriction upon their use, the lease need not contain an express covenant by the lessee imposing restrictions; a lease for a particular use, or to be used for a particular purpose implies a restriction against other uses."

Sullivan vs. Monahan, 123 App. 467.

Respondent used the premises for purposes other than that specified in the lease and is, therefore, liable for damages resulting from such misuse.

"If the demised building is leased to be used for a particular purpose, and the lessee, in violation of his contract, uses it for another purpose, he does so at his peril; and if in consequence of such unlawful use the premises are destroyed, the tenant is liable, irrespective of any question of negligence."

35 C. J. 1221.

It is agreed that the damages sustained by claimants amounts to \$2,207.80, less \$300.00 recovered from insurance, and claimants are entitled to an award for such damages.

An award is entered in favor of claimants, Everett Bailey and Dorothy Bailey, in the sum of One Thousand Nine Hundred Seven and 80/100 Dollars (\$1,907.80).

(No. 3906—Claim denied.)

JAMES H. WOODS, Claimant, *vs.* STATE OF ILLINOIS, Respondent.

Opinion filed June 12, 1945.

CHARLES M. KENNEY, for claimant.

GEORGE F. BARRETT, Attorney General; C. ARTHUR NEBEL, Assistant Attorney General, for respondent.

COMMERCE COMMISSION—*employee thereof—using his own car in course of employment—when claim for damages to said car will be denied.* Where an employee of the State uses his private property in the discharge of his duties, he assumes the risk of loss or damage to the property as an incident to his employment. There is no rule of law by which the State can be held to insure the property of an employee that is being used by such employee while in the discharge of his duties.

FISHER, J.

This claim is for damages to claimant's automobile, which he was required to use in the performance of his duties as a utility engineer for the Illinois Commerce Commission. For the use of his car claimant was paid mileage by respondent at the rate of \$.04½ per mile. On January 12, 1945, while claimant was on business of the State, pursuant to instructions, he was driving west on Route 16 in the Village of Tower Hill when he was compelled to veer suddenly to the left to avoid hitting another automobile, and claimant's automobile collided first with a timber sign post and then with a concrete headwall of a culvert. Claimant thereby sustained damages to his automobile in the sum of \$366.62, for which sum he seeks an award.

The record consists of the Complaint, Departmental Report, Transcript of Evidence, Statement, Brief and Argument on behalf of Claimant, and Waiver of Brief by Respondent.

There is no rule of law by which the State can be held to insure the property of an employee that is being used by such employee while in the discharge of his duties. The probability of such loss or damage is a risk incident to the employment.

Caslyn vs. State, 9 C. C. R. 107.

Hupp vs. State, 10 C. C. R. 360.

Connor vs. State, 12 C. C. R. 21 at page 25.

Award denied.

MOSSER vs. ILLINOIS PUBLIC AID COMMISSION.

The Illinois Public Aid Commission having asked the Court of Claims for advice concerning the following

claim made against it by an employee, for compensation for accidental injuries, the court in compliance with said request furnished the following advisory opinion, based upon the facts submitted and set forth in the matter hereinafter set forth.

ILLINOIS PUBLIC AID COMMISSION

ADVISORY OPINION No. 2.

(Payment of \$167.50 advised.)

RUTH C. MOSSER, Claimant, *vs.* ILLINOIS PUBLIC AID COMMISSION, Respondent.

Opinion filed March 13, 1945.

A request for an advisory opinion has been submitted by the above respondent based upon the following facts :

ECKERT, J.

The claimant, Ruth C. Mosser, is employed by the Illinois Public Aid Commission as a Social Service Consultant I. As such consultant, on August 29, 1944; she was sent by her superior, Mrs. Eleanor F. Proctor, Chief of the Division of Standards and Service, to Shawneetown, Illinois, to analyze designated cases as processed by the Gallatin County Department of Public Assistance. Before her work at Shawneetown was completed, and on the morning of August 30th, while en route to the office of the County Department of Public Assistance, she turned on her right ankle, falling to the ground on both hands and knees.

Following the accident, an x-ray was taken by Dr. E. W. Burroughs of Shawneetown. This disclosed a fracture of the right patella. Dr. Burroughs then placed claimant's knee in a temporary cast. Claimant, after

reporting the accident to her Chicago office, returned to Chicago, going directly to the University of Chicago, University Clinics, where she was treated by Dr. Bonfllio.

While claimant was a patient at the University Clinics, five x-rays were taken, a cast was applied to her right leg on two different occasions, and she received numerous massage and heat treatments. Her leg remained in a cast for approximately seven weeks, and she was absent from her duties from August 31, 1944, to November 16, 1944.

Claimant was first employed by the respondent on September 16, 1942. Her salary is \$245.00 per month. Her duties consist of analyzing case work practices and case supervision in county welfare departments, making plans and providing consultations and directions in the solution of problems, assisting county welfare departments in making improvements of service to applicants and recipients of public assistance, assisting county welfare department superintendents in meeting with service clubs, civic and other organizations, and interested individuals for the purpose of program interpretation, preparing and studying reports and reviews as required, and working with public assistance representatives on service training or orientation programs for county visitors. Claimant in the performance of her duties—is required to travel to all parts of the State.

Responsibility for administration of the Public Aid Program in Illinois is divided between the overseers of the poor, who administer general relief and care for the medically indigent, and the Illinois Public Aid Commission, which administers the Social Security Programs through the County Department of Public Assistance of the one hundred and one (101) downstate counties, and by the Public Assistance Division of the Cook County

Bureau of Public Welfare in Cook County. The County Departments operate in accordance with uniform policies and procedures as set out by the Commission.

The Illinois Public Aid Commission has created many departments and divisions through which assistance is administered, one of these being the Supplies and Storage Department. The work of this department includes the receiving, storing, shipping, loading, unloading, packaging, unpackaging of all furniture and equipment used by the Commission throughout the State; and also the cutting of paper used by the Commission in its work.

Claimant seeks reimbursement from the Illinois Public Aid Commission, in the sum of \$25.00 for the services of Dr. Burroughs, and seeks payment by the Illinois Public Aid Commission to the University of Chicago, University Clinics, in the sum of \$142.50 for services rendered by the Clinics. These charges have been examined by the respondent and found to be reasonable.

At the time of the injury, claimant and respondent were operating under the provisions of the Workmen's Compensation Act of this State; claimant sustained accidental injuries which arose out of and in the course of her employment; and notice of the injury was given to the respondent, and claim for compensation was made, within the time provided by the Act.

Section 8, Sub-section (a) of the Act provides:

"The employer shall provide the necessary first aid medical and surgical services, and all necessary medical, surgical and hospital services thereafter, limited, however, to that which is reasonably required to cure or relieve from the effects of the injury * * *

The court, therefore, is of the opinion that claimant, under the provision of the Workman's Compensation

Act of this state, is entitled to payment of her medical expenses, and that the Illinois Public Aid Commission should pay to claimant the sum of \$25.00 reimbursement for the services of Dr. E. W. Burroughs, and should pay to claimant for use of the University of Chicago, University Clinics, the sum of **\$142.50** for its services, or a total sum of \$167.50, out of any funds held by the Commission and allocated for such purposes.

ROWE vs. ILLINOIS STATE HISTORICAL LIBRARY.

The Illinois State Historical Library having asked the Court of Claims for advice concerning the following claim made against it for the return of a portrait loaned to the State, the court in compliance with said request furnished the following advisory opinion, based upon the facts submitted and set forth in the matter hereinafter set forth.

ILLINOIS STATE HISTORICAL LIBRARY

ADVISORY OPINION No. 3.

(Surrender of Portrait to Claimant Advised.)

FREDERICK H. ROWE, COLE YATES ROWE, RICHARD YATES ROWE,
AND MILLICENT ROWE SAMMUELL, Claimants, vs. ILLINOIS
STATE HISTORICAL LIBRARY, Respondent.

Opinion filed April 17, 1945.

A request for an advisory opinion has been submitted by the above respondent based upon the following facts :

ADVISORY OPINION BY CHIEF JUSTICE DAMRON.

Frederick H. Rowe, Cole Yates Rowe, Richard Yates Rowe and Millicent Rowe Sammuell made a demand for a pastel portrait of Ex-Governor Richard Yates 'which

came into the possession of the Trustees of the Illinois State Historical Library in 1920 through delivery to them by Richard Yates, Jr., now deceased, and has remained in their possession ever since.

The aforesaid trustees have directed the librarian to request an opinion of this Court as provided for in Chapter 37, Sec. 432, Par. 5 of the Illinois Revised Statutes with reference to this demand and have accompanied the request for our opinion with a record consisting of a formal demand by claimants, copies of letters, and a reply of the above named claimants.

THE RECORDS

The claimants assert, in their demand, that they are entitled to the sole and exclusive possession by reason of the fact that in 1865 the Ex-Governor gave the portrait to his only full sister, namely Millicent Yates Mathers, who then lived in Jacksonville, Illinois. That the said Millicent Yates Mathers upon receiving the portrait, placed it in her home in Jacksonville, Illinois; she kept it hanging on the wall of her living room until she died at the age of 84 years. That long before, and at the time of the death of Ex-Governor Richard Yates, which occurred in 1873, the portrait by reason of the gift, as aforesaid was the sole and exclusive property and remained in the possession of his said sister, Millicent Yates Mathers. That she was the mother of one child, a daughter, namely Marietta Mathers, who was her only direct and sole heir at law, and upon her death the portrait became the property of her daughter. Marietta Mathers, while owner of and in possession of said portrait was married to one Frederick H. Rowe, one of the claimants, and after said marriage the said Marietta Mathers Rowe and Frederick H. Rowe continued to live in the city of Jacksonville, Illi-

nois, and said portrait continued to hang upon the walls of the living room of their home in said city. That there were born to Marietta Mathers Rowe and Frederick H. Rowe, three children who are claimants herein, namely Cole and Richard Rowe, and Millicent Sammuell.

That in 1920 Richard Yates, Jr., came to Jacksonville and discussed with his cousin, Marietta Mathers Rowe, the matter of her loaning said portrait of Ex-Governor Richard Yates to the State of Illinois for the purpose of having same exhibited in the new Illinois Centennial Building, then about to be opened to the public for the first time; that she consented to loan the portrait for that purpose, whereupon it was taken from the walls of the living room of her home and sent by her in her automobile in care of the said Richard Yates, Jr., to Springfield, Illinois, only for the purpose of exhibiting it in the Centennial Building. Claimants further alleged that at the same time a portrait of Mrs. Catherine Yates, wife of the War Governor, was placed in the Centennial Building as an exhibit alongside of the portrait of the Civil War Governor which was borrowed from the home of Murphy Jackson, who lived in Jacksonville, Illinois, and who had been a nurse and attendant to Mrs. Catherine Yates during her lifetime and who had obtained the portrait from the Civil War Governor as a gift.

These claimants further allege that Marietta Mathers Rowe died on August 27, 1928, while the portrait of the Civil War Governor was still on exhibit in the Illinois Centennial Building. That at the time of her decease she left a will bequeathing all of her personal property to her husband Frederick H. Rowe, claimant, for the period of his natural life, and upon his death to their three children the claimants herein. That during all of the time from 1920 to the death of Marietta

Mathers Rowe, the claimants had no reason to doubt that the portrait would be returned to them upon request to the Trustee of the Illinois State Historical Library, and they had no reason to believe, they allege, that the State of Illinois or any collateral heirs of the War Governor were claiming title to the portrait.

That on April 11, 1936, Richard Yates, Jr., died, whereupon the claimant, Richard Yates Rowe requested the Historian at the Illinois State Historical Library to deliver up the portrait so that he might take it back to the family home in Jacksonville, whereupon the said Historian advised that he would have to **look** into the matter and that he would discuss the matter with him later; that on several occasions thereafter, the claimants requested the returning of the portrait to them from the Illinois State Historical Library but for various reasons the portrait was not delivered to them. That subsequent thereto, the claimants applied to the Trustees of the Illinois State Historical Library by making a personal and direct request for the portrait, to Oliver R. Barrett, a member of the Board of Trustees, who informed claimants that a letter was in the files of the Illinois State Historical Library purporting to be signed by one Mrs. Richard Yates, Jr., who is now deceased and who, in her lifetime was a daughter-in-law of Ex-Governor Richard Yates, in which letter the daughter-in-law expresses the thought that she believed it was the intention of her husband, Richard Yates, Jr., to have the portrait remain in the Illinois State Historical Library, that therefore, the Illinois State Historical Library could not return the portrait to these claimants nor could they recognize the right to the portrait as the heirs at law of Mary Mathers Rowe.

Attached to the request for this opinion we find the record of a carbon copy, unsigned receipt as follows:

Illinois State Historical Library
Springfield

December 6, 1930.

This is to certify that Hon. Richard Yates has deposited in the Illinois State Historical Library the following pictures which are to be returned to him or his heirs on demand:

- 1 oil painting by Healy of his mother, Mrs. Richard Yates.
- 1 pastel picture of his father, Governor Richard Yates.

Librarian, Illinois State
Historical Library.

c/c for Library.

Copy of letter of Mrs. Richard Yates:

Pleasant Ridge,
Michigan
April 23, 1939.

MY DEAR MR. ANGLE:

In compliance with my husband's wishes, I would like to present the portraits of Richard Yates, Sr. and his wife, to the Illinois State Historical Library. These portraits were placed in your care some time ago, during my husband's lifetime. I am certain that it was his intention that they should be given to the Library, to remain there permanently.

Very sincerely yours,

(Signed) HELEN WADSWORTH YATES.
Mrs. Richard Yates,
25 Poplar Park,
Pleasant Ridge, Michigan.

Letter of Mrs. Catherine Yates Pickering :

Pleasant Ridge, Michigan,
February 19, 1945.

MY DEAR MR. ANGLE:

I am very sorry that there has been any embarrassment about the portrait of my grandfather, Richard Yates. I do not believe that there is anything that my sister or I could add to the letter from my mother which is in your possession. Mother had a remarkable memory, and I am positive that she was correct in her statement that Father wanted to have the portraits in the Library.

In regard to the portrait of my grandmother. It hung on the wall of our hall at 1190 Williams Blvd. after the death of my grandmother in 1908. It certainly did not belong to "Auntie Mercy," her life-long companion.

It is too bad that the Rowes waited twenty-five years to present their claim. It would have been better if they had done so in my father's lifetime.

Very truly yours,

(Signed) CATHARINE YATES PICKERING.

, And the following statement by the State Historian:

"No member of the Board of Trustees or staff of the Illinois State Historical Library has any personal knowledge of the conditions under which the pastel portrait of Richard Yates was placed in this Library.

At a meeting in Chicago, September 14, 1944, the Trustees of this Library took cognizance of Mr. Rowe's claim. Their action is recorded in the minutes of the meeting as follows:

The Librarian was instructed to inform Secretary of State Richard Yates Rowe that the Trustees were under an obligation, moral as well as legal, to respect the claim of title of those from whom it obtained the portrait of Richard Yates, Sr., and that therefore they could not honor his request that the portrait be turned over to him."

Respectfully submitted,

(Signed) PAUL M. ANGLE, *State Historian*.

Illinois State Historical Library, Springfield, Illinois.

We have carefully considered the record presented to us and find that the respondent would not be justified in withholding this portrait 'from the claimants. Title passed to Millicent Yates Mathers, sister of Ex-Governor Richard Yates, by gift from the War Governor to her in 1865 and at the time of the gift she took possession of said portrait and possession remained in her until her death; at her death title and possession of this portrait passed to her only daughter and sole heir at law, Marietta Mathers Rowe. Marietta Mathers Rowe died on August 27, 1928, leaving a last will and testament bequeathing all of her personal property, including this portrait, to her husband Frederick Cole Yates Rowe, Richard Yates Rowe and Millicent Rowe Sammuell, all of whom are claimants.

The Court is of the opinion that Richard Yates, Jr., who delivered the portrait to the Illinois Historical

Library in 1920, was not the owner of it and could not have passed title to the respondent.

We advise the Trustees of the Illinois State Historical Library and its Custodian to surrender the portrait to the above claimants.

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- No. 3436 Cleve P. Steckler, Jr.
- No. 3437 Joe Bushong
- No. 3457 Michael Bellovich
- No. 3458 Willard Corcoran
- No. 3461 Lucille Rush
- No. 3599 Vincent Conrad
- No. 3817 Marjorie L. Koshinski
- No. 3835 Air Reduction Sales Co.
- No. 3841 Anna O'Connor
- No. 3850 James Snaidr

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